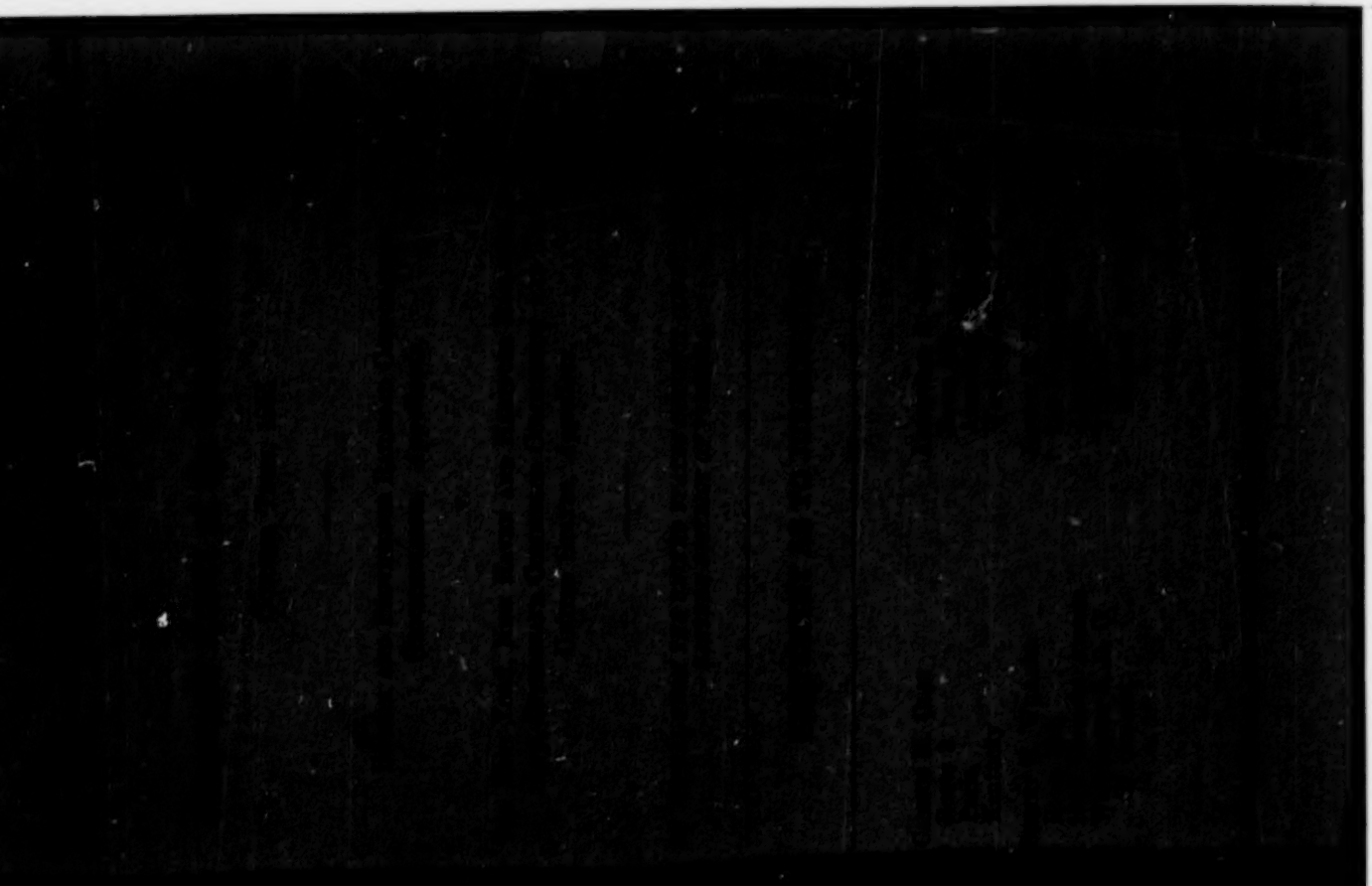

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Supreme Court of the United States

OCTOBER TERM, 1955

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants,*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

This is a direct appeal to the Supreme Court from final orders of a special three-judge federal district court in the Eastern District of Virginia, sitting at Alexandria. Appellants submit this Statement to show that the Supreme Court has jurisdiction of the appeal, and to show that it presents substantial questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Appellants are a group of stockholders of the Boston and Providence Railroad Corporation. The original mem-

bers of the group filed a complaint in the Interstate Commerce Commission against The New York, New Haven and Hartford Railroad Company, asking the Commission to determine and prescribe fair divisions under the Interstate Commerce Act for their Boston & Providence Corporation from through traffic transported over the connecting lines of the two companies, principally over the New York and Boston Shore Line Route. The Commission denied relief. Appellants sought judicial review in the three-judge court, which granted defendants' motions for dismissal, refused to allow the Boston & Providence reorganization trustee to intervene as plaintiff, and taxed extraordinary costs against appellants on the ground that the action was oppressive and vexatious to the New Haven Company.

OPINIONS BELOW

The one-paragraph opinion and final order of the Commission *sub nom. Group of Boston and Providence Railroad Corporation Stockholders* v. *The New York, New Haven and Hartford Railroad Co.*, No. 31489, has not yet been reported but is appended hereto. (App. p. 1a)

The opinion which the three-judge court filed with its judgment against appellants *sub nom. Group of Boston and Providence Railroad Corporation Stockholders* v. *Interstate Commerce Commission et al.*, Civil No. 1066, has not yet been reported but is appended hereto. (App. p. 2a) The court's unreported supplemental order taxing extraordinary costs is appended hereto. (App. p. 13a) The court did not enter any findings of fact or conclusions of law apart from the appended opinion and supplemental order.

JURISDICTION

Appellants filed their complaint in the lower court under the Urgent Deficiencies Act, 28 U.S.C. §§ 1336, 1398, and 2321 to 2325, inclusive, for a permanent injunction setting

aside and annulling a final order of the Interstate Commerce Commission, whereby the Commission had dismissed appellants' complaint against the New Haven Company asking the Commission to determine and prescribe just, reasonable, and equitable divisions for their railroad corporation. The complaint to the Commission had been filed under the Interstate Commerce Act.

The three-judge court's order of dismissal was dated and entered on March 31, 1955. Appellants' timely application for rehearing and reconsideration was denied by an order dated and entered on May 6, 1955. The court considered on the merits appellants' motion to vacate the order of May 6, and denied it by order dated and entered July 1, 1955.

The application of the Boston & Providence trustee for leave to intervene as plaintiff was denied by the order of July 1, 1955, whereby the court also refused to grant the appellants' supporting motion to join the trustee as plaintiff, and denied their motion for leave to file a supplemental pleading showing their efforts to have the trustee join in maintaining the action, and also denied their motion to delete from the court's opinion its holding that the stockholder appellants lacked standing to maintain the court action.

By an order dated and entered on June 15, 1955, the court taxed appellants with extraordinary costs; and by its order of July 1, 1955, it denied their motion to amend the order and grant appellants a hearing.

The appellants filed their notice of appeal from all of the foregoing orders on July 5, 1955. They filed a supplemental notice on August 30, 1955, of an additional question presented by their appeal from the order of July 1, 1955. The notices were filed with the Clerk of the United States District Court for the Eastern District of Virginia, at Alex-

andria. The District Court enlarged the time to docket the appeal and file the record in the Supreme Court.

The jurisdiction of the Supreme Court rests on 28 U.S.C. § 1253. The appeal was timely, according to 28 U.S.C. § 2101 (b).

Cases sustaining the Supreme Court's jurisdiction of the appeal include the following:

Alton Railroad Co. v. *United States*, 287 U.S. 229;
Baltimore & Ohio Railroad Co. v. *United States*, 298 U.S. 349;
United States v. *Great Northern Railway Co.*, 343 U.S. 562.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The complaints to the Commission and the district court invoked relief under provisions of the Interstate Commerce Act which regulate rates and divisions, principally sections 1(4), 15(3), and 15(6). 49 U.S.C. §§ 1(4), 15(3), 15(6). Other portions involved include the statement of national transportation policy preceding section 1, and sections 1(18), 5(2), 6(6), 6(7), and 13(1). 49 U.S.C. §§ 1(18), 5(2), 6(6), 6(7), 13(1).

The action in the district court was brought pursuant also to the Urgent Deficiencies Act, 28 U.S.C. §§ 1336, 1398, and 2321 to 2325, inclusive. It also involved section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009.

Throughout the proceedings appellants also invoked the protection of the clauses of the Fifth Amendment to the Constitution of the United States which protect private property devoted to the public transportation service from confiscation.

The denial of relief was founded principally on construing paragraph (c)(6) of section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (c)(6), as depriving the Boston & Provid-

ence Corporation of the protection of the provisions of the Interstate Commerce Act regulating rates and divisions, and, by implication, the protection of the Fifth Amendment.

The major provisions involved are as follows:

CONSTITUTION

Amendment V

> . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall any private property be taken for public use without just compensation.

INTERSTATE COMMERCE ACT

Section 1 (49 U.S.C. § 1)

> (4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; . . . . It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 15 (49 U.S.C. § 15)

> (3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers sub-

ject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. . . .

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, . . .

In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

ADMINISTRATIVE PROCEDURE ACT

Section 10 (~~49~~ 5 U.S.C. § 1009)

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the mean-

ing of any relevant statute, shall be entitled to judicial review thereof.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . .

BANKRUPTCY ACT

Paragraph (c)(6) of section 77 (11 U.S.C. § 205(c)(6)

(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended.

QUESTIONS PRESENTED

1. Do the provisions of the Interstate Commerce Act regulating rates and divisions apply to an independent railroad company, after a lease of its railroad system has been terminated by rejection on the part of the former lessee's reorganization trustees, so that the liability for providing the public transportation service on the system has reverted to the owning company under the compulsions of its public franchise obligations, and its system is being operated by an operating agent appointed by the former lessee's reorganization court under paragraph (c)(6) of section 77 of the Bankruptcy Act, but solely for the account of the owning company and without expense to the operating agent?

2. Did the court below err in holding (App. p. 9a) that appellants' company may not obtain the protection of section 15 of the Interstate Commerce Act to regulate its divisions with its principal connecting carrier for the reason that the Connecticut federal court has exclusive jurisdiction to pass on the accounts for the operation of appellants' company's system by the connecting carrier according to its appointment under paragraph (c)(6) of section 77?

3. Did the lower court err in holding (App. 12a) that appellants' company has a lessor-lessee relationship with the connecting carrier operating its railroad system and therefore is not entitled to any divisions under the Interstate Commerce Act—even though the only lease of the system was terminated in 1938, and it is being operated by the connecting carrier pursuant to appointment under paragraph (c)(6) of section 77?

4. Does section 15(6) of the Interstate Commerce Act become inapplicable (App. p. 12a) to the regulation of divisions between two connecting carriers so long as they share a common operating management?

5. Did the court below err in holding (App. p. 8a) that appellants' company may not obtain the protection of section 15 of the Interstate Commerce Act to regulate its divisions with the connecting carrier for the reason that the issues raised by the appellants' complaint are *res judicata*, although no other section 15 complaint has been filed on behalf of appellants' company, no accounts dividing the revenues in question between the two companies have been adjudicated, and no basis for dividing the revenues has been adjudicated for application to the accounts?

6. Did the court below err in holding (App. p. 3a, 9a) that confiscatory divisions can be imposed upon appellants' railroad company under the guise of applying the admittedly confiscatory formula of 1938 in settling the accounts

between appellants' company and the company which is its connecting carrier and also its operating agent by court appointment under paragraph (c)(6) of section 77?

7. When the three-judge district court accepted the standing of stockholders of a railroad company in reorganization to bring a proceeding against another railroad company before the Interstate Commerce Commission, did the court err (App. p. 8a) in denying the standing of those stockholders to obtain review of an adverse order of the Commission?

8. Did the lower court err (App. p. 8a) in holding that the stockholder appellants had no standing as persons adversely affected and aggrieved by the Commission's order which dismissed their complaint against the connecting carrier for fair divisions for their railroad company under section 15 of the Interstate Commerce Act—when their company's stockholders have the only financial interest in obtaining such divisions, all of its bonds having been bought by the connecting carrier, which is also the operating agent for appellants' company railroad system by court appointment under paragraph (c)(6) of section 77, and which, despite that fiduciary position, has, as the defendant in the proceeding, a dominant conflicting interest in preventing the relief sought?

9. Did the lower court err in law or exceed judicial discretion in making *all* of the following rulings:

A. In refusing to allow the reorganization trustee of appellants' company to intervene as a plaintiff pursuant to 28 U.S.C. § 2323, on his application and the supporting application of appellants, the court having held that the appellant stockholder plaintiffs lacked standing under Civil Rule 23 to maintain the action, and the Massachusetts federal court in charge of the reorganization of appellants' company having ordered the trustee to intervene as plaintiff;

B. And in simultaneously refusing to allow the appellant stockholders to file a supplemental pleading under Civil Rule 15 (d) showing with particularity their efforts to have the trustee join as plaintiff in maintaining the action;

C. And in also thereupon denying appellants' motion to vacate its holding that they lacked standing to maintain the action?

10. Did the lower court err in law or exceed judicial discretion in holding (App. p. 13a) that appellants' action to obtain judicial review of the Commission's order was vexatious and oppressive to The New York, New Haven and Hartford Railroad Company, which intervened as a defendant under 28 U.S.C. § 2323, and for that reason taxing the appellants with extraordinary costs in favor of the New Haven Company, including attorneys' fees or salaries of its general solicitor and other lawyers—in view of the fact that the establishment of a proper basis for dividing the through revenues in question is of the utmost importance to the appellants' Boston & Providence estate, and that the Court of Appeals for the Second Circuit has already held with respect to parallel accounts that the question of rights under section 15 (6) of the Interstate Commerce Act must be raised before the Commission in the first instance, and that the Massachusetts federal court in charge of the reorganization of appellants' company after hearing appellant's arguments as to the nature and importance of the action, and after hearing the arguments of the New Haven Company that this action, and this appeal, are wanton, vexatious, and oppressive, expressly directed its reorganization trustee to intervene in the present action as co-plaintiff in order to obtain rulings on the substantive questions involved and announced that, in view of the importance of this action to the Boston & Providence estate and reorganiztion, the court's consideration of the reorganization plan will be deferred until after the issues raised in this action shall have been finally determined?

STATEMENT OF THE CASE

The appellants are stockholders of the Boston and Providence Railroad Corporation, which acquired, constructed, and owns (through its reorganization trustee) a compact assembly of railroad properties, herein called the Boston & Providence System.

I. BACKGROUND OF THE ACTION

The Boston & Providence Enterprise

The Corporation was organized in 1831 as one of the three original railroad ventures of the old Boston merchant community, to build a straight line to Providence. It was a solid financial success.

Today the Boston & Providence System consists of multiple main tracks between Boston and Providence, four short branches, and elaborate urban lands, terminal facilities, and shops—all held under the Corporation's valuable franchises received long ago from Massachusetts and Rhode Island, which the Corporation has never surrendered. The through passenger trains operated between South Station and Back Bay Station in Boston and Providence Union Station, en route to and from New York, Philadelphia, and Washington, provide a progressive inter-city service that, considering the three factors of density, modernity, and prosperity, seems at the moment to be unequaled. The dense, high-class through freight traffic uses the South Boston freight terminal and separate main tracks for nine miles, on all of which the Corporation holds a perpetual free easement, and the Boston & Providence System reaches along the central Boston waterfront through the unconsolidated subsidiary Union Freight Railroad (half-owned) to the Boston & Maine Railroad connection at North Station. The System connects with all railroads at Boston, but its most active connection for through traffic is at Providence, where it owns classification yards and extends to all tracks generally, either through

ownership or by easement, and where it connects with the main line of The New York, New Haven and Hartford Railroad Company, the principal appellee, between Providence and New York and Hudson River Trunk Line Gateways. *Boston & Providence R. Corp. Reorganization, Fourth Supplemental Report,* 290 I.C.C. 363, 364. (R. fol. 177-8. See fol. 2-4, 10, 226, App. p. 4a.)

The New Haven Company operates the entire Shore Line Route between Boston and New York, but it operates the Boston & Providence section, not for its own account, but in a separate capacity under court appointment, without expense to the New Haven estate and solely for the account of the Boston & Providence Corporation. It seems proper to describe the New Haven Company in this capacity as the operating agent, for it charges all expenses of the Boston & Providence System to the Boston & Providence Corporation, which both the Interstate Commerce Commission and the courts have held to be the originating and terminating carrier at Boston for all traffic of the Shore Line Route. *Id.,* p. 383-4 (R. fol. 187) quoting the Connecticut federal court and *Palmer* v. *Palmer,* 104 F. 2d 161, 167.

Its Remarkably High Valuation Per Share

The determination of the Interstate Commerce Commission's Bureau of Valuation for December 31, 1953, shows that the value of the tangible properties fully owned by the Boston & Providence Corporation then totaled $36,669,169, based on current market value of lands and rights and cost of reproduction less depreciation for other items. (R. fol. 470) After deducting the principal amount of the Corporation's entire funded debt, $2,170,000, the balance of $34,499,169, amounted to $940 per share for the 36,688 shares of the Corporation's old common stock which are held outside the Corporation. If the value of the easements and subsidiary interest were added the total would

undoubtedly exceed $1,000 per share, on the Bureau's basis. The par value of $100, which the shares still bear as a survival from 1831, is misleadingly low The New Haven Company owns 3,397 shares, leaving 33,291 shares (or 90 per cent) held by numerous stockholders, including the appellants. There are also 3,312 shares held for the account of the Corporation itself, of which 40 are in the treasury and 3,272 are in a sinking fund to retire the bonds. The bonds, or debentures, are called "debenture bonds", and the sinking fund is their only security. They matured in 1938, and principal and interest since then have been in default.

The Former Boston & Providence Lease of 1888

In 1888 the Corporation leased its system to the Old Colony Railroad Company (which owned an assembly of railroads south of Boston) for a term of 99 years. Thereby the lessee took over from the Corporation the primary responsibility for providing the public transportation service on the Boston & Providence System. The Corporation retired to an inactive lessor status but retained full title to its franchises and stood by as a kind of surety to Massachusetts and Rhode Island for the performance of the public service by Old Colony. The Boston & Providence operation became an operation of, by, and for the Old Colony Company—but only for the actual duration of the lease, which was fated to terminate in 1938.

The provisions of the 1888 lease recognized the value of the lessor's property. Besides agreeing to discharge the lessor's franchise obligations and maintain its railroad system the lessee paid a bonus of $1,300,000 and agreed to provide for the Corporation's organization expenses, taxes, and interest payments, plus $400,000 or $10 per share per annum on all 40,000 of the Corporation's shares. Subsequently the latter item was altered to $340,000 for dividends plus payment of all income taxes assessed against the Corporation. The reduced amount for divi-

dends came to $8.50 per share on all 40,000 shares, but was worth $9.26 per share to the owners of the Corporation, since 3,312 of the shares were held in the Corporation itself.

In addition to the foregoing amounts (which the Commission inaccurately found to be the rent) the lessee also agreed to provide for the retirement of the Corporation's entire debt and to make all improvements to the Boston & Providence System during the term of the lease, without cost to the Corporation.*

In Order to Get the Vital Boston Traffic for Its New Connecticut Shore Line Route the New Haven Company Took Over the Boston & Providence System in 1893 by Leasing the Entire Old Colony System

Before 1892 the New Haven Company was not itself a factor in Rhode Island or Eastern Massachusetts. The Boston & Providence and Old Colony Systems maintained through routes to New York and beyond via the coordinated Long Island Sound steamers which dominated the through freight and passenger traffic. See Kirkland, *Men, Cities and Transportation, A Study in New England History,* Harvard, 1948, vol. II, p. 148. In 1872 the original New York & New Haven was extended by merger to Hartford and Springfield, where it joined the east-west line of the Boston & Albany Railroad (second of the original Boston trio) to form the original all-rail line between Boston and New York. Another inland all-rail line was formed with an aggressive Boston railroad, the New York & New England. The New Haven Company, holding a monopoly entrance to New York, grew restive over dividing the Boston revenues with the Boston railroads, and resolved to drive its own route east all the

* Thus, as the debt and capitalization went *down* the value of the property went *up*, while the road was transformed from an 1888 railroad into a first class line of today. The Commission's finding of rent ignored these basic items. See *Fourth Supplemental Report*, 290 I.C.C. 363, 365 (R. folio 178).

way to Boston. First it took over the Shore Line Railroad, which ran, or, rather, "crawled fifty miles along the edge of the Sound to New London. It had a tiny traffic." Kirkland, *op. cit.* p. 83. But New London Harbor was not bridged until 1889. *Id.* p. 92. In 1892 the Company took over the independent Stonington Road from New London to Providence, and on February 15, 1893, it took over the Boston & Providence System. To do so, it had to lease the entire Old Colony System, boat lines and all.

By establishing the Boston & Providence main line as the head of its new Shore Line Route, the New Haven Company proceeded to use the great Boston traffic thus acquired—the most important traffic for the New Haven Company—as the foundation for converting the Shore Line Route into one of the world's principal through lines.

Every competing rail or water line between Boston and New York was dried up. The Shore Line Route, with the Boston & Providence main line as its head, became the backbone of transportation east of New York. The Poughkeepsie Bridge Route was re-aligned and connected with the Shore Line Route so as to make the latter dominant in western, as well as southern, freight. Thus, as the New Haven System achieved its maturity, the position of the Boston & Providence main line has become stronger and stronger.

In 1935, Following Disastrous Overexpansions the New Haven Company Went Into Reorganization and in 1936 Terminated the Old Colony Lease

Early in the Twentieth Century, the New Haven Company over-reached itself in an attempt to create a complete New England transportation monopoly, rail, water, and highway (i.e., trolley line). At its high point the New Haven monopoly stretched from the Hudson to the Bay of Fundy, but it proved to be financially disastrous. See *Financial Investigation of New York, N.H. & H. R.R. Co.,*

31 I.C.C. 32. However, the strength of the Shore Line Route kept the company from defaulting until 1935, when it petitioned for reorganization under section 77 of the Bankruptcy Act. Judge Hincks, sitting at New Haven, granted the petition and presided over the ensuing reorganization proceedings which still continue.

On June 2, 1936, the New Haven trustees rejected the Old Colony lease of 1893 and thus terminated it. Since Old Colony had become their subsidiary, it applied for reorganization in the Connecticut federal court, jointly with the parent, as a so-called "secondary debtor". Judge Hincks appointed Messrs. Palmer et al., the New Haven trustees, also to be Old Colony trustees. He appointed the New Haven trustees to operate the entire Old Colony System under paragraph (c)(6) of section 77. The Boston & Providence lease remained undisturbed; the Boston & Providence System again became an operation of and for Old Colony, but was conducted by the New Haven trustees as operating agents.

In 1938 the Old Colony Trustees Terminated the Boston & Providence Lease, Thus Forcing the Carrier Liabilities to Revert to the Boston & Providence Corporation

On July 19, 1938, the Old Colony trustees terminated the Boston & Providence lease by rejecting it on the part of the lessee, Old Colony. Thereby, the primary liability for providing the public transportation service of the Boston & Providence System, under the compulsions of the continuing Boston & Providence franchises, reverted to the B. & P. Corporation. (See Order 217, R. fol. 118.)

The rejection had been considered for more than two years. It was precipitated by the Bankers Trust Company petition for Order 217, asking for rejection. (R. fol. 99.) The Bankers Trust Company of New York acted as mortgagee for New Haven bondholders, chiefly the great life insurance companies, one of whose presidents was co-trustee

with President Palmer. To support its petition a so-called "segregation formula" was presented, dividing the Shore Line Route revenues and expenses east and west of Providence. The mortgage covered the New Haven-owned lines west of Providence. Test apportionments under the formula showed that all the income was earned on the mortgaged portion west, with nothing but hopeless deficits incurred on the leased (or formerly leased) portion east. Judge Hincks referred the formula to the Commission—not for approval, but for "recommendations" under paragraph (c)(10) of section 77. (R. fol. 114.) The Commission reported that the formula seemed as fair as the circumstances would permit, but that it did not approve the use of the formula for any substantive purpose. However, it was on the basis of the formula that Judge Hincks authorized the rejection. (R. fol. 116-118.)

The formula thus served as a legal justification for throwing away Old Colony's most valuable asset on the verge of the greatest boom in railroading. Seen in retrospect, the rejection has been widely regarded as an error.

The Present Operating Agency for the Account of the Boston & Providence Corporation

The New Haven and Old Colony reorganization judge thereupon appointed the New Haven trustees to operate the Boston & Providence System in place of the Old Colony trustees, and for the account of the Boston & Providence Corporation without expense to the New Haven estate. Thus Judge Hincks continued a centralized common operating management for all three systems, the true New Haven system, the true Old Colony system, and the Boston & Providence system. (Order 217, R. fol. 118.)

In 1947 the New Haven and Old Colony joint reorganization was declared consummated. Judge Hincks discharged the joint trustees and turned the properties of his two debtors over to the reorganized New Haven board of di-

rectors. The stepchild Boston & Providence System he also turned over to the New Haven Company, by appointing the Company as successor to the New Haven and Old Colony trustees in the operation of the Boston & Providence System, which was continued under paragraph (c)(6), apparently as a partial extension of the New Haven and Old Colony reorganization administration. The New Haven Company has continued as the operating agent under the 1947 order to this day. (Order 1007, R. fol. 143.)

Cut Off From Income at the Moment of Its 1938 Debt Maturity, the Boston & Providence Corporation Went Into Reorganization in Massachusetts

The 1938 rejection coincided with the principal maturity of the Boston & Providence debt of $2,170,000. Normally that would not have been serious, but the Old Colony trustees claimed reimbursement for $3,955,000 (or $107 per share) in alleged deficits incurred in operating the property up through 1937—on the theory that the rejection of the lease related back to June 3, 1936, when the Old Colony trustees entered into office. Meanwhile, the Corporation was cut off from income. *Fourth Supplemental Report*, p. 368 (R. fol. 179).

A petition was filed for its reorganization in the Massachusetts federal court. Judge Ford, sitting at Boston, granted the petition and appointed Messrs. Bentley W. Warren and Charles W. Mulcahy, as trustees. Mr. Mulcahy survives. He is the trustee whose application for leave to intervene in this action as plaintiff was denied by the three-judge court.

No Basis for Dividing the Revenues From the Through Traffic of the Boston & Providence and New Haven Lines Has Been Established for Application to the Agency Accounts

There has been a continuing controversy over the establishment of a proper basis for dividing the revenues from the Shore Line traffic east and west of Providence in the

trustees' accounts. The New Haven trustees submitted an account through 1937 for the entire Old Colony System, including the Boston & Providence lines. The revenues were divided according to the segregation formula, producing enormous deficits for the Old Colony operation. Judge Hincks entered Order 300, allowing the account and imposed a prior lien against the Old Colony properties to secure reimbursement to the New Haven estate. Separate lawyers retained for the Old Colony trustees protested that in dividing the joint rates the agency accounts did not conform to the standards of section 15(6) of the Interstate Commerce Act. The Court of Appeals approved the accounts and charged the deficit against the Old Colony estate, refusing to consider Old Colony's rights under section 15(6), because Old Colony had "failed to raise the point before the Commission, which ... alone could consider it initially." *Palmer* v. *Palmer*, 104 F. 2d 161, 167. "It could not later ask the district court to take these up as an original question. . . . Furthermore, we do not see how the district court could in any event proceed of itself: § 15(6) of the Interstate Commerce Act gives power to divide rates only to the Commission; and the sole alternative to the course here taken would seem to have been an independent proceeding between the two roads under that section." (p. 165)

However, by Order 301 Judge Hincks had taken that portion of the accounts covering the Boston & Providence System from June 3, 1936, through 1937, and re-charged it against the Boston & Providence estate. But in *Palmer* v. *Warren*, 108 F. 2d 164, the Court of Appeals, while affirming Judge Hincks' jurisdiction, reversed on the accounting, holding that Boston & Providence interests had not had their day in court.

> ... Boston & Providence cannot now procure any change by the Commission in the 'Segregation Formula' itself. However, we meant to decide before, and we now decide again, that the Boston & Providence is

> free to oppose the application by the District Court of that formula to the liquidation of its account with the debtors as freely as though Order No. 300 had not been issued. (p. 169)

Hearings were held on remand but were suspended following the illness of a witness. They have not yet been resumed. Thus, no agency accounts to the Boston & Providence Corporation for the operation if its system have ever been adjudicated, and no basis for dividing what Judge Hand called "the joint rates" has ever been adjudicated for "application" to the accounts. Nor has the reorganized company even filed an account for the period since 1947.

During the past seventeen years of the operating agency, the New Haven management has reported combined net railway operating income, after operating expenses and taxes, amounting to around $200,000,000 from the operation of its own lines as principal and the Boston & Providence lines as agent.* But nothing whatever has yet been paid to the Boston & Providence Corporation. Until a basis for dividing the revenues can be established according to law, the accounts will remain deadlocked.

In the present proceeding the three-judge court below has now held that the revenues must be divided according to the confiscatory formula. (App. p. 9a) But no other court has so held—nor has the Commission.

In 1954 the Commission Approved a Reorganization Plan for the Boston & Providence Corporation in Which Its Railroad System Was Valued on the Basis That It Is Being Operated at Continuous Over-All Deficits

On January 5, 1954, a majority of the I.C.C. Commissioners adopted a Fourth Supplemental Report of the Commission, approving a plan of reorganization for the

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* The figure was reached by totaling net railway operating income since 1938, from annual issues of Moody's Manual.

Boston & Providence Corporation, as proposed by the New Haven Company, which provided for a sale of the B. & P. railroad system to the New Haven Company as of the end of 1939 at a basic price of $3,980,000, according to the calculation in Commissioner Clarke's dissenting opinion. The Commission reiterated its pre-war finding that the Boston & Providence System has been operated during the agency period at substantial over-all deficits and is incapable of any earning power whatever, so that on the primary earning-power test of value in reorganization it is worthless, and its value must therefore be measured according to an offer of the New Haven which had been proposed in 1938 or 1939 and incorporated into the Commission's plan of reorganization for the New Haven Company itself as an offer to buy. *Fourth Supplemental Report*, 290 I.C.C. 363, 391, 399 (R. fol. 177, 191, 193).

II. THE PRESENT ACTION

The Appellants' Complaint

Immediately following the issuance of the Commission's 1954 Plan a group of four Boston & Providence stockholders, Messrs. H. C. Barton of Alexandria, Virginia, Alfred J. Ostheimer III of Philadelphia, James H. Sachs of Pound Ridge, N. Y., and Robert K. Straus of New York, N.Y. (who were later joined by Robert B. Eichholz of Washington, D. C., and Henry J. Stone of Manchester, New Hampshire, the Corporation's largest individual stockholder), acting on behalf of the stockholder interest, immediately took two steps.

First, they intervened in the Boston & Providence reorganization proceeding on March 8, 1954, to ask the Commission to reconsider its plan of reorganization for the reason that there was not available any lawful measure of earnings or earning power of the Boston & Providence System that could properly be used as a measure of its value—as required by the decisions of the Supreme Court

in the *Western Pacific* case (318 U.S. 448, 477) and the *Milwaukee* case (318 U.S. 523, 540).

After the Supreme Court handed down its opinion of April 5, 1954, in the Florida East Coast case (*St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298) the B. & P. stockholder group called the Commission's attention to the decision for its holding with respect to the forced sale of one railroad system to a connecting railroad system through the section 77 reorganization process, and for the underlying principle that section 77 of the Bankruptcy Act did not supersede or abridge the Interstate Commerce Act except where specifically provided by Congress.

The Commission, however, in its *Fifth Supplemental Report*, of July 30, 1954, (290 I.C.C. 404) upheld its *Fourth Supplemental Report*, reiterating that the Boston & Providence System has no earning power, and that it must be sold to the New Haven Company at the pre-war New Haven offer. 290 I.C.C. 404 (R. fol. 198).

Meanwhile, on March 17, 1954, the stockholder group had filed a complaint in the Commission asking it to determine and prescribe just, reasonable, and equitable divisions between the Boston & Providence Corporation and the New Haven Company. The purpose of the complaint was to secure for the owners of the Boston & Providence System the protection of the sections of the Interstate Commerce Act regulating rates and divisions, particularly section 15(6). (R. fol. 11.)

More broadly, the complaint was intended to secure for the Boston & Providence Corporation the protection of the Fifth Amendment against continued operation of its railroad system on the confiscatory basis reported by the Commission in repeated eternal-deficit findings in the Fourth and Fifth Supplemental Reports.

The relief sought by complainants was the only relief that appeared to be available to their corporation, inasmuch

as the Commission had already refused to allow the abandonment of the Boston & Providence Railroad System, and had refused, upon application of the Boston & Providence Trustee, to fix terms for an operating agreement or lease* under section 5 of the Interstate Commerce Act, (49 U.S.C. 5,) in *Boston & Providence R. Corp. Reorganization*, 275 I.C.C. 320, 275 I.C.C. 617. (R. fol. 165, 173.)

By a final order dated July 17, 1954, the Commission denied the relief sought and dismissed the complaint. Its one-paragraph opinion simply cited its own earlier decision in *Wood* v. *New York Central Railroad Company*, 286 I.C.C. 373, in which it had denied divisions to The Peoria & Eastern Railway Company (App. p. 1a).

It appeared to the stockholder group that the total effect of the Commission's denial of the relief sought was to continue to hold the Boston & Providence Corporation in bondage, by closing the last door to relief. The corporation, never having been insolvent in the bankruptcy sense, was insolvent in the equity sense only because it had been denied the protection of the Fifth Amendment and the rates and divisions sections of the Interstate Commerce Act which, in view of the dense through traffic, would insure the operation of its railroad system with revenues sufficient to cover costs and to earn a fair return.

On October 26, 1954, the stockholder group sought review of the Commission's order of July 17, 1954, in the United States District Court for the Eastern District of Virginia. A special three-judge court was convened, which heard argument on February 14, 1955, on motions of defendants to dismiss the complaint and plaintiffs' motion for summary judgment. The three-judge court entered an order on March 31, 1955, granting the motions to dismiss the complaint, and filed an opinion. (App. p. 2a)

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* In 1939 the Commission had denied the trustees' request that it determine fair earnings under paragraph (c)(11) of section 77. *B. & P. R. Corp. Reorg.*, 233 I.C.C. 467.

The Opinion Below

The three-judge court held as follows:

1. That the issues raised in the complaint had already been decided in previous decisions of the Connecticut and Massachusetts federal courts and the Commission. (App. p. 8a; cf. Question 5, *supra*.)

2. That the stockholder appellants lacked standing in court to obtain judicial review of the Commission's order, even though it was directed against them as complainants before the Commission, where their standing was established. The defect in standing was based on Civil Rule 23, which requires that stockholders suing on a claim of their corporation show their efforts to have the suit maintained by the Corporation's officers, directors, or trustees, as a condition of obtaining standing themselves. (App. p. 8a; cf. Question 7 & 8.)

3. That divisions under section 15(6) of the Interstate Commerce Act could not be obtained so long as the Boston & Providence system is being operated under paragraph (c)(6) of section 77 and the Connecticut federal court retains jurisdiction over the accounts. A basis of divisions under the Interstate Commerce Act could not be used because it would upset the divisions under the segregation formula of 1938, which the Court said apply. (App. pp. 3a, 9a, 12a; cf. Questions 1, 2, 6.)

4. That the Boston & Providence Corporation may not have any divisions under the Interstate Commerce Act because it is still a lessor and not engaged in actual transportation. (App. p. 12a; cf. Question 3.)

5. That section 15(6) of the Interstate Commerce Act applies only between railroad companies whose systems have separate managements. (App. p. 12a; cf. Question 4.)

Supplemental Orders

By a supplemental order of May 6, 1955, the three-judge court (1) denied a timely motion for rehearing, (2) granted a motion of the largest individual stockholder to join as plaintiff, and (3) granted appellants' motion to postpone the proceeding until April 30 to give the Boston & Providence trustee time to decide whether to intervene as plaintiff, but (4) denied appellants motion for a further continuance of 30 days to give time for Judge Ford in Boston to hold a hearing on appellants' petition that the trustee be instructed to join as plaintiff. (R. fol. 388-416.)

That hearing was necessary because the trustee had decided not to join, in view of the failure of his repeated efforts to rescue the property, unless instructed to join by the Boston federal court. Appellants filed a petition for instructions, but, following a request for postponement by counsel for the New Haven Company, the hearing scheduled for May 18 was not held until June 13 and 14. Appellants' petition was supported by the stockholder committee and the corporation. The New Haven Company appeared and argued that the action—and this appeal—are wanton, vexatious, and oppressive to the New Haven Company, according to an affidavit that counsel had filed in the three-judge court. On June 16, however, Judge Ford ordered the trustee to intervene before the three-judge court at Alexandria as plaintiff. (R. fol. 441-450.)

On June 15, the three-judge court entered a supplemental order taxing extraordinary costs against the appellants, including reimbursement to the New Haven Company for the services of its general solicitor, holding that the maintenance of the court action was vexatious and oppressive to the New Haven Company as intervening defendant. (App. p. 13a.)

On June 21, the Trustee filed an application to intervene as plaintiff, pursuant to the order of the Massachusetts federal court. (R. fol. 453.) The appellants also

moved (1) for leave to file a supplemental pleading under Civil Rule 15(d) setting forth with particularity their efforts to have the trustee join in maintaining the action (fol. 457); and (2) to amend the opinion by the deleting the holding that the plaintiffs lacked standing to maintain the action (fol. 471); and (3) to amend the order taxing costs by deleting the extraordinary items (fol. 472)—all in light of the Boston hearings of June 13 and 14 and Judge Ford's order. They also filed a supporting motion to joint the trustee as plaintiff and moved to vacate the order of May 6. (fol. 481-485.)

After considering the motions on the merits the three-judge court denied them all by its order of July 1. (App. p. 15a.)

ARGUMENT ON SUBSTANTIALITY

THE QUESTIONS ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BY THE SUPREME COURT WITH BRIEFS ON THE MERITS AND ORAL ARGUMENT, FOR THEIR RESOLUTION

As to Question 1: How Far Section 77 Supersedes Normal Regulation Under the Interstate Commerce Act

This appeal raises once more the general question of to what extent Congress intended that section 77 of the Bankruptcy Act should supersede the Interstate Commerce Act and the normal pattern of public regulation.

National transportation policy

The holding of the lower court would violate the national transportation policy. A major object of Congress in enacting the Interstate Commerce Act in its modern form has been to create a prosperous and healthy transportation system. Revenues are to be divided fairly between carriers, so that all the necessary segments of the nation's railroad system may endure to serve the public needs, in peacetime and wartime, without government operation. The policy is laid down in the preamble and, with respect to through

transportation, in section 1(4). The standard for dividing through revenues is particularized in section 15(6). 49 U.S.C. preceding § 1, and §§ 1(4), 15(6). The Supreme Court has recognized the policy in innumerable decisions, including, for example, the recent Montana Western divisions case, *United States* v. *Great Northern R. Co.*, 343 U.S. 562. But the decision of the three-judge court would repeal the national transportation policy with respect to the Boston & Providence Corporation—and any lessor company unfortunate enough to suffer similar indignities in the future by having the lessee's reorganization administrators similarly impound its railroad system following their rejection of the lease. After all, some of the most important railroad arteries are leased lines, such as the United New Jersey, the Philadelphia, Baltimore & Washington, the Northern Central, the Pittsburg, Fort Wayne & Chicago, the Panhandle, the Michigan Central, the Big Four, the Clinchfield, and even the Central Pacific.

Statutory construction

Nothing in the text of paragraph (c)(6) itself (*supra*, p. 7) supports the lower court's view. If there is any ambiguity in the text, the scant legislative history resolves it against the lower court. At the time of its enactment the Chairman of the Senate Committee on Interstate Commerce declared on the floor of the Senate that it was just a "minor amendment"—a characterization that Senator Wheeler would not have made if it were intended to suspend the application of the normal regulation of interstate rates (including divisions) under the Interstate Commerce Act for any railroad. See *Cong. Record*, vol. 79, pt. 13, p. 13765.

Conflict with Supreme Court decisions

The major fields of public-service regulation of railroads include regulation of their transportation services, their mergers, and their rates and divisions. The Supreme Court has already held in *Palmer* v. *Massachusetts*, 308 U.S. 79,

that section 77 of the Bankruptcy Act did not empower the federal judge presiding over the New Haven reorganization to order wholesale cancellations of local train service in Massachusetts on the Old Colony and Boston & Providence lines except in full compliance with the normal Massachusetts regulation of intrastate railroad service.

Last year, in the Florida East Coast case, *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, the Supreme Court also made it clear that Congress, by enacting section 77, had not superseded the provisions of the Interstate Commerce Act regulating railroad mergers. The Commission, acting in its special role under section 77, was not allowed to approve and certify a plan of reorganization providing a merger of the Florida East Coast with a connecting system except in full compliance with the provisions of the Interstate Commerce Act regulating mergers. Not having superseded those provisions explicitly, section 77 did not supersede them *sub silentio.*

The present appeal raises the question with respect to the normal public regulation of railroad rates, including divisions. The specific relief which appellants seek—establishment of just, reasonable, and equitable divisions for their estate because it bears the expense of providing the compulsory transportation service of its railroad system—is basic in the field of railroad revenue regulation. The principal freight traffic of eastern railroads is through traffic, and while revenues are expressed in terms of "rates, fares, and charges" (as in section 15(6), *supra*, p. 6) per unit of traffic, as paid by the public, what each carrier actually receives and retains from such traffic is expressed in terms of divisions.

Section 15 regulates divisions even more explicitly than section 5 regulates mergers. Even the counsel upholding the Commission's Florida East Coast merger plan in oral argument before the Supreme Court on the ground that section 77 superseded the provisions of section 5 regulating

mergers, when asked if he would carry his argument to the length of asserting that it also superseded the provisions of the Interstate Commerce Act with respect to "rate-making", conceded that section 77 cannot be so interpreted. (See argument of Edward Bourne, Esquire, in the *St. Joe* case, October Term 1953, No. 24, Oral Argument, page 57.)

By now deciding against that view, so as to hold section 15 inapplicable to the Boston & Providence Corporation, the lower court has disregarded the Congressional policy as expressed in section 15(6) "in a way in conflict with applicable decisions of this court" (cf. Supreme Court Rule 19)—certainly in conflict with their underlying principles.

As to Question 2: Whether the Connecticut Federal Court's Exclusive Jurisdiction to Pass on the Accounts Excludes an I.C.C. Proceeding Under Section 15(6)

The Supreme Court has already affirmed the power of the Connecticut federal court to pass on the accounts between the New Haven management and the Boston & Providence estate, so as to protect its own debtor—now its former debtor—from incurring losses through its operating agency for the account of the former lessor. *Warren* v. *Palmer*, 310 U.S. 132. But in doing so the Court did not indicate that the accounts between the two companies could depart from the Interstate Commerce Act—any more than the calculations of taxes chargeable to the Boston & Providence estate could depart from the Internal Revenue Code.*

The three-judge court now holds, however, that because the jurisdiction to pass on the accounts is vested in the reorganization court, the Commission has no jurisdiction to entertain an independent proceeding under section 15(6). Yet when a parallel question was raised with respect to the accounts for the Old Colony operation, the Court of Appeals

* The Court of Appeals affirmed Order 1007 appointing the reorganized New Haven Company to operate the B. & P. System under paragraph (c)(6) after "consummation". *In re New York, N. H. & H. R. Co.*, 169 F. 2d 337; certiorari denied, 335 U. S. 867.

said that Old Colony interests could not raise in the Connecticut federal court the question of its rights under section 15(6) in the accounting, because they had not raised the question before the Commission.

> "Furthermore, we do not see how the district court could in any event proceed of itself: § 15(6) of the Interstate Commerce Act gives power to divide the rates only to the Commission; and *the sole alternative* to the course here taken would seem to have been *an independent proceeding between the two roads under that section.*" *Palmer* v. *Palmer,* 104 F. 2d 161, 165" (italics added).

So, as the situation stands, the court having appellate jurisdiction over the Boston & Providence accounts under paragraph (c)(6) has held that an independent proceeding under section 15(6) is the way to invoke the standard of the Interstate Commerce Act for dividing the rates in the accounting under paragraph (c)(6)—while the three-judge court below has held that because of paragraph (c)(6) no independent proceeding under section 15(6) can be brought.

This is the clearest kind of conflict between courts of review dealing with the same issue, and, if only for this reason, the three-judge court's ruling raises substantial questions of law.

As to Question 3: Whether the Boston & Providence Corporation Is Now Merely a Lessor

The significance of the "lessor" status is that it would disqualify the Boston & Providence Corporation from any divisions whatever.

The three-judge court's final appraisal of the relationship between the two companies is this. "Legally B & P is still the 'lessor', and New Haven is still the 'lessee' of B & P's facilities; and they will continue so for as long as the Connecticut federal court allows the New Haven to run B & P under 77(c)(6) of the Bankruptcy Act or until the line is abandoned." (App. p. 12a.)

That view conflicts squarely with the decision of the Supreme Court in *Palmer* v. *Webster & Atlas National Bank*, 312 U.S. 156. There this Court held that the New Haven trustees or company was "merely operating the lines of those companies [including the Boston & Providence Corporation] to prevent public inconvenience" (p. 165) and not as a principal engaging in business on its own account.

When the Boston & Providence System really was leased, the Corporation was entitled to rent as fixed in the lease contract. But the whole significance of the rejection of the former lease lay in the fact that rejection terminated the lessor-lessee relationship and the contract—and left the former lessor to bear the expense of the transportation service and to derive compensation *only* from the traffic. That result was recognized in the text of paragraph (c)(6); nor was it altered by Judge Hincks' appointment of the New Haven management to conduct the operation for the owner.

The New Haven Company was never directly the lessee of the Boston & Providence System; it merely had acquired an assignment of the Boston & Providence leasehold through entering into the Old Colony lease of 1893. But the Old Colony lease was rejected—and terminated—by the New Haven trustees in 1936. So from 1936 to 1938 the New Haven Company had no possible lessor-lessee relationship with respect to the Boston & Providence lines. For the New Haven Company to have been the lessee of the Boston & Providence lines, as the three-judge court holds, would imply that Judge Hincks' 1938 order under paragraph (c)(6) created a lessor-lessee relationship. But the operation thus prescribed for the account of the Boston & Providence Corporation—without expense to the New Haven estate—is the very opposite of a lessor-lessee relationship. *A lessee operates for the lessee's account.*

As to Question 4: Whether Section 15(6) Is Inapplicable Between Railroad Companies Sharing Common Management

The three-judge court held that sections 1(4) and 15(6) of the Interstate Commerce Act apply *only* to railroads operated under separate managements, i.e., do not apply between railroads sharing common management. The court supported its novel view only by mis-stating a parenthetical dictum of Judge Learned Hand in *Palmer* v. *Palmer* that those sections apply "primarily at any rate" to roads under separate management. 104 F. 2d 161, 165.

The three-judge court's holding jeopardizes many solvent railroads, which share management services in the interest of economy and efficiency. Sometimes they are mutually independent (such as the Boston & Maine and Maine Central, which shared management until recently). If one is a subsidiary of another it usually has independent stockholders and bondholders who rely on the integrity of the divisions structure as protected by the Interstate Commerce Act to preserve the earning-power value of their property.[1] The Alabama Great Southern, the Cincinnati, New Orleans & Texas Pacific, the New Orleans & Northeastern, and the Southern railroad companies all share common management, as well as a common trade name for marketing purposes, yet they all receive divisions from through traffic shared with each other's systems. See *I.C.C. List No. of 4 of Corporate Names of Common Carriers By Rail, Express and Pipe Line Filing Tariffs, Concurrences, etc.* The list includes the Long Island, which is operated like a division of the parent Pennsylvania Railroad Company, and the New York & Long Branch, for which the Jersey Central and the Pennsylvania furnish operating management and equipment. It reports its equipment ownership as

[1] Without that protection they would be limited to relief in equity, where the parties and court would be completely deprived of the Commission's expert knowledge and judgment in a field which Congress has peculiarly entrusted to the Commission.

follows: "*Equipment*—Locomotives, none; total cars, none." See *The Official Railway Equipment Register, April 1955,* I.C.C. tariff No. R.E.R. 315, p. 542.

The Shore Line Route itself illustrates the situation. At the New York end, it is extended south from the Bronx by the line of The New York Connecting Rail Road Company, over the Hell Gate Bridge and to the Pennsylvania's East River passenger tunnels, and to the Pennsylvania's Jersey Shore freight railhead (by ferry from Bay Ridge). Its management and rolling stock are provided by the New Haven Company, but it obtains divisions (see *I.C.C. List No. 4, supra*) adequate to support its fabulous mortgage debt. See *Moody's Manual.* The Union Freight Railroad at the Boston end gets divisions similarly, although it is half owned by the Boston & Providence Corporation—which does not. The New Haven Company files common tariffs for all. Insofar as the tariffs cover Boston & Providence stations, the New Haven Company of course files them pursuant to its operating agency under its court appointment, although it prefers not to mention the B. & P. Corporation explicitly with the several other companies for which it performs the filings.

The three-judge court's position conflicts with the Commission's decision of May 18, 1954, to prescribe increased divisions for the New Jersey & New York Railroad Company, an 80 per cent Erie subsidiary, which, like Old Colony, was in reorganization jointly with the parent, in the Northern District of Ohio. When the Ohio court confirmed the parent's reorganization plan, without reorganizing the New Jersey road, it transferred the orphan to the federal court in New Jersey, which appointed a separate trustee. The increased divisions apply to through traffic shared with the Erie and New York Central systems. *New Jersey & New York Railroad Company (Peter Duryee, Trustee)* v. *Erie Railroad Company et al.,* 292 I.C.C. 479, reversing 288 I.C.C. 219, where the relationship is

explained. The Erie Company continues to provide management services and rolling stock for the New Jersey road.

If the three-judge court is upheld, all the above lines and many others, and their independent stockholders and bondholders, will be stripped of their protection under sections 1(4) and 15(6)—in utter disregard of the Congressional intent.[2]

As to Question 5: Whether the Issues Raised by the Complaint Are Res Judicata

The three-judge court said:

> "The mere relation of the facts in this case is enough to reveal that the plaintiffs' grievances have been carefully heard in behalf of B & P in the Connecticut and Massachusetts federal courts as well as by the Interstate Commerce Commission; it bares the present suit as simply another presentation of the issues already decided by those tribunals. On this score alone the complaint could be dismissed, but to be more explicit, we will rule seriatim on the points made by the pleadings." (App. p. 8a.)

Assuming that this is a holding of *res judicata*, the lower court has carried that doctrine beyond the limits recognized by the Supreme Court and by the authorities in general. *Commissioner* v. *Sunnen*, 333 U.S. 591; *Restatement of Judgments*, §§ 47, 48.

The question of how the revenues from the through traffic are to be divided has not been finally adjudicated for any year since the effective date of the termination of the

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[2] A syndicate has elected a new board of Boston & Maine directors, all pledged to elect as president Mr. Patrick B. McGinnis, who is already president of the New Haven Company. If, in this situation and others, combined operating management is conceivably desirable, that the question should be considered by the Commission and security holders without the fear that combined management might see-saw the divisions up and down to suit syndicate policy with the right to I.C.C. supervision cut off.

former Boston & Providence lease (*supra*, pp. 18-20). Order 301 of the Connecticut federal court approving accounts through 1937 was reversed by the Court of Appeals in *Palmer* v. *Warren*, and the court held that the basis of dividing the revenues was open to future consideration (*supra*, p. 19). The accounts have not been settled on remand. The questions raised by "plaintiffs' grievances" thus remain open, since there has been no final order on their merits.

As for the Massachusetts federal court, its order instructing its trustee to intervene in this action as co-plaintiff makes it clear that it does not consider the rights of the Boston & Providence Corporation under the Interstate Commerce Act *res judicata*, either by virtue of its own decisions or decisions of any other court.

Indeed, under the logic of the Court of Appeals in *Palmer* v. *Palmer*, only the Commission could provide a basis for dividing what the court called "the joint rates" according to the standard of section 15(6) of the Interstate Commerce Act. The basis could not have been determined in the first instance in either the Connecticut or Massachusetts federal court.

Aside from the present proceeding, the Commission has never passed on the rights of the Boston & Providence Corporation arising out of the joint traffic. Its "recommendations" under paragraph (c)(10)—which the three-judge court misnames as "approval" (App. p. 9a)—with respect to the segregation formula *expressly omitted* consideration of "severance value or strategic value", or "contribution of traffic originating or terminating upon particular mortgaged lines" [including also leased lines] to system earnings," or "value of particular facilities", or "effect of potential operating economies"—all of which would be required for consideration when presented as factors in a proceeding governed by the standard of section 15(6). The formula made no allowance for the Boston passenger ter-

minal costs, on the ground that "the additional time and expense . . . would not be justified." So, realizing the limitations of its coverage, the Commission was careful to state that it was not approving any substantive use of the formula. *New York, N. H. & H. R. Co. Reorganization,* 224 I.C.C. 723, 725, 729, 730. In any event, when the Commission considered the formula, the Boston & Providence Corporation was only a lessor, not entitled to divisions.

Two years later, in determining that the Boston & Providence System had no earning power whatever, the Commission emphasized that the 1938 formula did not meet the section 15(6) standard.

> If operated independently, as a connection with the New Haven, the debtor would have to depend upon the division of through rates and fares which it might secure from the New Haven. *Obviously it could not survive on the revenues assigned to it by the segregation formula and would, therefore, have to receive very much larger allowances on the through traffic than those allocated by the formula.* How much larger allowances would be necessary, or what such allowances would leave for the balance of the New Haven in ton-mile and passenger-mile earnings is not shown by the record. *Boston & Providence R. Corp. Reorganization,* 239 I.C.C. 465 at page 479.

Not only could the section 15(6) issue not have been dealt with in the Massachusetts or Connecticut federal court in the first instance, but, once properly raised in a proceeding under section 15, it could be considered on review of the Commission's order only by a special three-judge court sitting as successor to the former Commerce Court of the United States under the Urgent Deficiencies Act, 28 U.S.C. § 2325. The Connecticut reorganization judge, for example, could not by himself have reviewed the Commission's order, nor could the Court of Appeals for the Second Circuit. The rights of the Boston & Providence Corporation under the Interstate Commerce Act could be claimed and pursued

only before the Commission, and only the courts appointed by Congress were empowered to grant judicial review.

It can therefore be fairly said that until the special three-judge court below made its ruling on the appellants' complaint, no court of competent jurisdiction had ever considered the rights of the Boston & Providence Corporation under section 15.

As to Question 6: Whether Confiscatory Divisions, Otherwise Illegal, Can be Imposed in the Guise of a Segregation Formula for the Accounting Under Paragraph (c)(6)

The three-judge court held that the relief sought cannot be granted for the reason that the apportionment of revenues between the Boston & Providence Corporation and the New Haven Company is governed by the segregation formula of 1938. All parties conceded that operation under the formula would leave the Boston & Providence Corporation with over-all *operating* deficits year after year, even before its modest fixed charges, so that the Corporation would be required to serve the public on a basis of continuous confiscation.

It is axiomatic that forced operation on that basis—and the Commission refused to allow abandonment (*supra*, p. 22)—violates the Fifth Amendment to the Constitution and our most fundamental legal principles.

Undoubtedly the three-judge court would have held illegal an order of the Commission establishing confiscatory rates for the Boston & Providence Corporation. Undoubtedly it would have held illegal an order of the Commission establishing confiscatory divisions for the Corporation. *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349.

The question now presented is whether that which would thus be held illegal can be brought about through the use of the formula of 1938. It seems impossible that confiscatory divisions can be lawfully imposed upon a railroad

company and its owners by *any* device. And yet the effect of the three-judge court's decision is to sanction confiscatory operation under the guise of holding that the New Haven Company is to account to the Boston & Providence Corporation according to the segregation formula of 1938.

Such a result, if the decision below were allowed to stand, would expose the value of every leased line property to despoilment by the administrators of the lessee's reorganization through the same confiscatory device. The result is unprecedented and in gross conflict with everything that the Supreme Court has ever said on the subject of basic property rights under the Constitution.

As to Questions 7, 8, 9: Whether the Appellants Acquired Standing to Obtain Judicial Review, and Whether the Trustee Should Be Admitted as Plaintiff

Since the federal administrative agencies now regulate and control a vast portion of the business and financial affairs of the country, the right to obtain judicial review of agency action is enormously important, as Congress has abundantly recognized. Various statutes governing individual agencies provide for judicial review, and section 10 of the Administrative Procedure Act fortifies the right generally (*supra*, pp. 7-8).

When appellants filed their complaint with the Commission they strictly followed long-established Commission precedents, whereby security holders have standing to seek divisions for their railroad company under section 15. For example, in the case cited by the Commission as authority for dismissing the complaint, *Wood* v. *New York Central* (App. p. 1a), the action requesting divisions for The Peoria & Eastern Railway Company was brought by income bondholders. Although the Commission denied relief for other reasons, it did not intimate in its long opinion that they were not proper parties to file a complaint under section 15. Nor did the Commission suggest that the present appellants lacked standing to file their complaint (App. p. 1a).

The three-judge court now denies appellants standing to obtain judicial review. Yet if the appellants had won in the Commission, the adversary party could surely have obtained review. To allow review in an adversary proceeding to one side only—the paradoxical position of the three-judge court—means that it "has so far departed from the accepted and usual course of judicial proceedings" (cf. Supreme Court Rule 19) as to require correction. The position has no precedent. The cases mentioned by the lower court (App. p. 9a) were primarily concerned with the rights of *intervenors* before the administrative agency to obtain judicial review—not the rights of the moving party in the agency action.

The present holding squarely violates the Congressional mandate of section 10 of the Administrative Procedure Act (quoted, *supra*, pp. 6-7) that "every agency action made reviewable by statute" (such as the Urgent Deficiencies Act) shall be subject to judicial review. It also violates that provision in section 10 which grants review by right to persons "adversely affected or aggrieved" by agency action. Surely appellants meet that qualification. The agency action was directed against them personally. It condemns their company to continued insolvency, by withholding the lawful basis for dividing the revenues, which results in leaving the operating accounts deadlocked and their railroad system impounded by the hostile connecting carrier through its own phantom reorganization proceeding in Connecticut. The only escape which the Commission allows is by swallowing the connecting carrier's depression offer, which the Commission adopted in its 1940 New Haven & Old Colony reorganization plan (*New York, N. H. & H. R. Co. Reorganization*, 239 I.C.C. 337) as a firm offer to buy, but which it can justify only by blindly clinging to its eternal-deficit finding as an *idée fixe*—which would evaporate if it were to grant the appellants' complaint.

The three-judge court says that, whatever the provisions for judicial review may be, they do not supersede Civil Rule 23(b), which denies standing to stockholders suing on a secondary right *unless* they show efforts to have the corporation proceed through its officers, directors, or trustees (App. p. 8a). But Rule 23(b) applies to active corporations only, with active officers and active directors or trustees managing its affairs. The Boston & Providence officers and directors are legally inactive, by virtue of section 77. The Boston & Providence Trustee is not the sort of trustee referred to in Rule 23(b), where the word "trustees" is used because directors are legally called trustees in the District of Columbia and elsewhere. If it meant bankruptcy trustees it would have included "receivers", or reorganization courts.

But the appellants' interests are not really secondary. Actually, the stockholders have the only substantial interest in obtaining judicial review. Since the filing of the complaint, the hostile New Haven Company, although it had withdrawn its application for permission to buy the Boston & Providence bonds, nevertheless went ahead and bought them all anyway. Despite its obvious fiduciary obligations to the Boston & Providence stockholders the New Haven management is now openly governed by its dominant conflicting interest as a connecting carrier.

In order to simplify the issues appellants, following the issuance of the court's opinion, requested the bankruptcy trustee to join as plaintiff. In view of the procedural discouragements which frustrated his long succession of efforts to get relief, he decided not to join in this action without instructions from his reorganization court. At the suggestion of Judge Ford in Boston, appellants filed a formal petition for instructions (R. folio 441). The original date for hearing was postponed at the request of the New Haven Company. At the hearing on June 13 and 14 the petition

was supported by the Boston & Providence directors and a majority of its stockholders. The New Haven Company argued that the action was "wanton, vexatious, and oppressive", taking the view that by a broad application of the *pro tanto* dictum in *Warren* v. *Palmer,* 310 U.S. 132, 138, the Boston & Providence interests had lost their rights under the Interstate Commerce Act. Judge Ford, however, instructed the trustee to join in maintaining this action as co-plaintiff. The trustee's petition for intervention was filed pursuant to Civil Rule 24 and the third paragraph of 28 U.S.C. § 2323. Appellants filed a supporting motion, also moved for leave to file a supplemental complaint reporting their efforts to bring in the trustee, and moved to vacate the holding denying them standing and the order of May 6 denying rehearing and reconsideration. But, although it considered the applications on their merits, the court denied them by its final order of July 1, 1955. (App. p. 15a; R. fol. 457-486.)

The court's repeated denial of judicial review raises questions of great importance, particularly in view of the Administrative Procedure Act.

As to Question 10: The Taxing of Extraordinary Costs

Appellants say that for seventeen years the New Haven management has cleverly manipulated the reorganization process as a kind of procedural shell game. It is true that a long and dismal series of efforts has been made to extricate the Boston & Providence System from captivity. But when the three-judge court (App. pp. 13a, 15a) brands the appellants' diligent efforts to protect their common interest and the interests of their company as vexatious and oppressive to the New Haven Company, and penalizes the appellants, it has, in effect, said that the action is not in good faith and has so far departed from the accepted and usual course of judicial proceedings as to require the Supreme Court to exercise its power of supervision.

The letter of the lower court's action in taxing extraordinary costs has no precedent under the Civil Rules. Its spirit violates the holding of the Supreme Court in *Southern Pacific Company* v. *Bogert*, 250 U.S. 483, that unsuccessful attempts to secure justice do not generally bar relief that would otherwise be proper.

After all, appellants are only acting in accordance with the precept of the Court of Appeals in *Palvin* v. *Palmer*, that the way to get the benefit of section 15(6) is by bringing a proceeding under section 15(6) in the Commission. The Commission's denial results in withholding a share of the very large income from the operation of the joint Shore Line Route.

To uphold the lower court would be to discourage attempts of stockholders to protect themselves and their estates and would be contrary to any recognized principle of justice.

It is significant that the Massachusetts court ordered the trustee to intervene in this action as plaintiff after he had heard counsel for the New Haven Company present his view that the proceeding—and this appeal—are wanton, vexatious, and oppressive, and that the court announced that consideration of the plan of reorganization will be deferred until after the Supreme Court shall have given its decision on the questions presented by this appeal.

CONCLUSION

This appeal raises substantial issues of far-reaching importance in the relationships between railroad reorganization administration by the courts and the Commission and administrative regulation under the Interstate Commerce Act, as well as issues of construction of the latter, which affect a vast number of railroad security holders. It raises an issue of construction of the right to judicial review under the Administrative Procedure Act, which affects still wider interests.

From the standpoint of the Boston & Providence reorganization administration this appeal is of the utmost importance. The corporation languishes in one reorganization court while its railroad system is stranded in another. Although highly solvent in the bankruptcy sense it is without income—but only because it obtains no share of the extremely large revenues received by the New Haven Company from the operation of the joint Shore Line Route. The three-judge court says it cannot receive a fair share of the revenues—which would make it fully solvent and thus take it out of reorganization—because it is now in reorganization and operated under a paragraph of Section 77.

Appellants hope, through this appeal, to rescue the Corporation and its owners from the vicious circle. According to the three-judge court's holdings, they have no standing under the Interstate Commerce Act and no protection against confiscation through compulsory operating deficits. That court's view rests on a misunderstanding of the Supreme Court opinion in *Warren* v. *Palmer*, is contrary to the constitution and the Interstate Commerce Act, and calls for plenary review by the Supreme Court.

Respectfully submitted,

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September 29, 1955

APPENDIX

APPENDIX

The Commission's Report and Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of July, A.D., 1954.

No. 31489

GROUP OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

Upon consideration of the record in the above-entitled proceeding, motion of defendant to dismiss the complaint, and complainants' reply to such motion, and it appearing that the Commission, in docket No. 30394, *Wood* v. *New York Central R. Co.*, 286 I.C.C. 373, decided July 7, 1952, considered substantially the same issues presented for determination in the complaint in No. 31489, with respect to division or apportionment of revenues under the principles set forth in section 15(6) of the Interstate Commerce Act, and concluded (at page 381 thereof) that "there must exist joint rates between carriers as a prerequisite to the exercise of our authority to fix divisions between them", and dismissed the complaint; and that no reasonable ground appears for further investigation within the meaning of section 13(1) of the Interstate Commerce Act, of substantially the same question as presented in the complaint in No. 31489:

IT IS ORDERED, That the said motion of defendant be, and it is hereby granted, and that the complaint in No. 31489 be, and it is hereby, dismissed.

By the Commission.

GEORGE W. LAIRD,
Secretary.

(SEAL)

Opinion of the Three-Judge District Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil No. 1066

GROUP OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS

v.

INTERSTATE COMMERCE COMMISSION et al.

(Argued February 14, 1955 Decided March 28th, 1955)

Before DOBIE, Circuit Judge, and HUTCHESON and BRYAN, District Judges.

* * * * * * * * * * *

BRYAN, *District Judge:*

Minority stockholders of the Boston and Providence Railroad, now in bankruptcy reorganization before the Federal district court of Massachusetts, here complain of the refusal of the Interstate Commerce Commission to determine and prescribe divisions of operating revenues between the B & P and the New York, New Haven & Hartford Railroad Company in respect to local and through traffic moved over B & P's lines by New Haven in its operation of those lines in connection with the New Haven system. B & P having no rolling stock or operational organization of its own, prior to 1938 its lines were operated by New Haven under a lease; in that year the lease was rejected by the Federal district court of Connecticut in the bankruptcy reorganization of New Haven; and since then New Haven's trustees, or the reorganized New Haven, have operated B & P for the latter's account under the Connecticut bankruptcy court's order, B & P's earnings and expenses being computed upon a formula fixed by the Connecticut court instead of by a division of rates with New Haven.

The burden of the complaint is that following termination of the lease B & P's lines have been in continuous use by the New Haven; that New Haven is collecting all the revenues; that computation of B & P's earnings and expenses by the formula shows a huge deficit every year when in fact the B & P is a highly profitable road; that if it were allotted a division of rates with New Haven as provided by sections 1(4) and 15(6) of the Interstate Commerce Act, 49 USCA 1(4), 15(6), it would reap the benefit of its productiveness; that the market value of its holdings have been sharply depressed by the denial of rates to it; and that by this means New Haven is forcing a sale of B & P's properties to New Haven and at a price far below a fair valuation.

The Commission dismissed the application for want of authority to entertain it. Finding that no joint rates existed between the two railroads, it held it was without power to fix divisions. The underlying reasons were (1) that B & P does not qualify as a carrier entitled to rates, and (2) that the Commission has no jurisdiction to give it rates while the bankruptcy court is supervising the operation of B & P and adjusting its earnings and expenses under the court's formula. This suit seeks vacation of the dismissal and "such further relief" as the court shall deem proper, the latter prayer contemplating a peremptory direction to the Commission to fix rates for B & P. In addition to the original defendants—the United States and the Interstate Commerce Commission—the Court has admitted the New York, New Haven & Hartford as an intervening defendant. Respondents' respective motions to dismiss and answers raise common issues. As will appear from the following narrative, there are no substantial fact differences.

Owned by Boston and Providence Railroad Corporation, Massachusetts chartered, B & P's lines extend from Providence, Rhode Island, to Boston, Massachusetts. It leased all of its properties in 1888 to the Old Colony Railroad

Company for 99 years; Old Colony in 1893 demised this leasehold, and its other property, to the New Haven for a like period; and thereafter the New Haven operated the lines of both. B & P's rails provide New Haven's only access to Boston; they are the sole link of the New Haven system with the Boston area; and thus for New Haven's through trains between Boston on one end and New York City, the South, and the West on the other, B & P is indispensable to New Haven.

In 1935 the New Haven petitioned the United States District Court of Connecticut for reorganization under section 77 of the Bankruptcy Act, 11 USCA 205. On June 2 or 3, 1936 the court rejected the Old Colony lease, and the next day Old Colony (stock controlled by New Haven) entered the same proceeding as a secondary debtor. Soon after the acceptance by the court of the reorganization application of New Haven, in order to account to the mortgagees, security holders and lessors of the New Haven, the trustees prepared a segregation, among the several divisions, of the entire earnings and expenses of the whole railroad system under their administration. This allocation indicated that the B & P was operating at an annual loss, and thereupon New Haven's first mortgagee petitioned the court to disaffirm the B & P lease. B & P resisted. After notice and pursuant to section 77(c)(10) of the Bankruptcy Act, the court referred the proposed segregation to the Interstate Commerce Commission for "its recommendation as to the method or formula by which the segregation and allocation should be made." On April 15, 1938 the Commission filed with the court its report approving the formula so submitted by the trustees, no exceptions were taken, it was adopted by the court, and no appeal was noted. By order of July 19, 1938 (No. 217) the reorganization court disaffirmed B & P's lease and decreed that, "5. Pending further order of Court the operation of the property of Boston and Providence for the account of that corporation shall be continued pursuant to subdivision

(c)(6) of Sec. 77 of the Bankruptcy Act * * * ." The subdivision reads as follows:

> "If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of the Interstate Commerce Act as amended."

August 4, 1938, the Federal district court of Massachusetts received and accepted the application of the B & P for reorganization. After considerable litigation between the trustees of the two railroads (see Palmer v. Warren, 1939, 2 cir. 108 F. 2d 164 and Warren v. Palmer, 1939, 310 U. S. 132) authority to determine the cost of operating the B & P was adjudged to be in the New Haven reorganization court; it was further declared that such administration costs were chargeable on B & P's property (as a first lien, there being no mortgage ahead) but ascertainment of the amount of these costs was left open. The trustees of New Haven and Old Colony on the one side, and the trustees of B & P on the other, thereafter stipulated the amount due the trustees of New Haven and Old Colony by the B & P on administration claims from June 3, 1936 (date of the rejection of the Old Colony lease) to January 1, 1940, as $7,000,000, and the sum due to B & P by New Haven and Old Colony as damages for rejection of its lease as $10,000,000. The administration deficit continued each year and on December 31, 1946 acounted to $12,000,000.

The Connecticut Court by a consummation order dated September 11, 1947, No. 1107, wound up the New Haven proceeding, restored its properties to the corporation free of the trusteeship, directed the reorganized New Haven to operate B & P until further order, but among other things reserved jurisdiction "(o) To consider and to act on any questions respecting claims between the Reorganized Company and the Boston and Providence Railroad Corporation or its trustee * * * arising out of the operation of the lines of the Boston and Providence by the Bankruptcy Trustee or the Reorganized Company". From this order B & P's trustee appealed. He contended (1) that cessation of the operation of B & P by New Haven's trustees ended the power of operation given by 77(c)(6), Bankruptcy Act, and constituted an abandonment of such operation prerequiring the permission of the Interstate Commerce Commission; section 1(18) of the Interstate Commerce Act, 49 USCA 1(18); (2) that the operation of B & P by the reorganized New Haven was a merger and could not be undertaken until the Commission had found and fixed, under section 5(2)(b) of the Act, 49 USCA 5(2)(b), just and reasonable terms and conditions for the operation; and (3) that the attempted retention of jurisdiction over claims arising from New Haven's running of B & P was invalid. The contentions were overruled. In re New York, N. H. & H. R. Co., 1948, 169 F. 2d 337, cert. den. 335 U.S. 867, 868.

New Haven's plan of reorganization had theretofore been confirmed (Old Colony Bondholders et al. v. N. Y., N. H. & H., 1947, 2 cir. 161 F. 2d 413); it included a proposal for the purchase of the B & P, and, incident thereto, the cancellation of all administration claims against B & P as well as the cancellation of B & P's damage claim for the rejection of B & P's lease. The consummation order also retained jurisdiction in the court to conclude the purchase of the B & P.

On April 1, 1948 the trustee of B & P, under the direction of his court, applied to the Commission (1) for au-

thority under section 1(18)-(20) of the Act, 49 USCA 1(18)-(20), to abandon operation of B & P's lines because of the absence of any Commission determination of operating terms and conditions for B & P's lines; and (2) under section 5(2) of the Act, 49 USCA 5(2), to fix just and reasonable terms and conditions for the operation of B & P by New Haven, alleging that neither 77(c)(6) of the Bankruptcy Act, nor the order of the Connecticut district court, controlled the operation of B & P's lines after the consummation order, the Commission having sole jurisdiction thereof. Both applications were denied on the authority of In re New York, N. H. & H. R. Co., supra, 169 F. 2d 337, the Commission holding that no abandonment of B & P was effected by the consummation order, and that so long as the Connecticut court retained jurisdiction to adjudicate operational claims between the New Haven and the B & P, the Commission was without authority "to pass on the accounting for such operation". See Report of Division 4, Finance Docket 12131, March 24, 1950; Report of Commission on Reconsideration, Finance Docket 12131, October 3, 1950; and Fourth Supplemental Report, Finance Docket 12131, January 5, 1954.

A plan for the reorganization of the B & P was also submitted to its court and was recommended by the Commission. It incorporated provisions for the sale of B & P to New Haven. On objection to some of the sale terms, inter alia, the plan was again referred to the Commission for further study. After hearing all parties in interest, the Commission filed its Fourth Supplemental Report (January 5, 1954, Finance Docket 12131) suggesting certain modifications of the original plan. For the sale of B & P to New Haven the report recommended terms deemed fair and just by the Commission. On March 8, 1954 all of the present plaintiffs, except Eicholz, requested the Commission to withdraw its approval of the last plan of reorganization. With other points, they argued to the Commission that the formula should not govern the accounting between

the railroads—that as the two were separate roads, the Commission should make a division of the rates now charged by the New Haven. The requests were declined. Fifth Supplemental Report, July 30, 1954. Action on the plan is now awaiting decision of the instant suit.

The mere relation of the facts in this case is enough to reveal that the plaintiffs' grievances have been carefully heard in behalf of B & P in the Connecticut and Massachusetts federal courts as well as by the Interstate Commerce Commission; it bares the present suit as simply another presentation of the issues already decided by those tribunals. On this score alone the complaint could be dismissed, but to be more explicit, we will rule seriatim on the points made by the pleadings.

I. Clearly the plaintiffs have no locus standi. As shareholders they sue to establish a right belonging to the corporation, but they aver no refusal, inability or failure of the corporation, its directors, officers or trustees to act. Rule 23, F.R.C.P. On the contrary, the record depicts a trustee and a supervisory court alert to the very privilege now urged for the corporation by the plaintiffs; witness the attempt of B & P's trustee, on the instruction of the Massachusetts court, to have the Commission certify an abandonment of B & P unless given rates for operation, and to have the Commission fix the terms of an operating agreement between the two roads. Because he has refrained from prosecuting a proceeding and suit in the pattern of the plaintiffs', we are not to infer that the trustee was uninformed or unwilling, but rather that he did not think it advisable.

The statutes governing this suit, 28 USCA 1336, 2321, do not either waive the prerequisites of a derivative action or allow suit by persons not directly injured by the deprivation of a right. Assuming that the plaintiffs were proper parties to initiate the complaint before the Commission, and recognizing that they were the sole petitioners there,

we do not think they qualify for that reason alone as parties plaintiff to vacate the Commission's order. Algoma Coal & Coke Co. v. U. S., 1935, E.D. Va. 11 F. Supp. 487, 495-496, by a three-judge court; Pittsburg & W. Va. Ry. v. U. S., 1930, 281 U. S. 479, 487; Schenley Distillers Corp. v. U. S., 1946, 326 U. S. 432, 435.

II. But, if the plaintiffs may sue, we are satisfied that we have neither the right nor the jurisdiction to grant the decree they pray. Did we have the power, the consequences of such a decree demonstrate its utter lack of merit; that we have no such power is equally clear.

The desired decree would compel the Commission to split New Haven's rates. The result would be to require the New Haven to account to B & P in a manner other than by the formula adopted therefor by the District Court in Connecticut, when the formula has the approval of the Commission and the Connecticut court's authority to ascertain the amounts, if any, due to B & P has been sustained by the Court of Appeals for the Second Circuit as well as by the Supreme Court. 108 F. 2d 164, 167, supra; 310 U. S. 132, supra. Furthermore, the Court of Appeals has upheld the Connecticut court in retaining jurisdiction to adjudicate all future claims of B & P arising out of New Haven's operation. 169 F. 2d 337, cert. den. 335 U. S. 867, supra.

We agree with the Second Circuit; and we agree with the conclusion drawn by the Commission from those decisions—"It follows, therefore, that so long as the Boston & Providence lines are operated by the New Haven as lessee for the account of the lessor pursuant to section 77(c)(6), the Connecticut district court, and not this Commission, has exclusive jurisdiction to pass on the accounting for such operation". Report of Division 4, March 24, 1950, Finance Docket 12131, supra. The trustees were "lessees" even after the termination of the lease. 169

F. 2d 337, 339, footnote 9. Previously in the same report the Commission recalled that "The applicant [B & P's trustee] concedes that the operation of the Boston & Providence lines was governed by the provisions of section 77 (c)(6) during the reorganization of the New Haven, and that the accounting therefore is subject to the exclusive jurisdiction of the Connecticut district court."

It is noteworthy that B & P's trustee was an active participant in all of this litigation; it is significant that he did not seek a court review of the Commission's March 24, 1950 report of "no jurisdiction".

On the issue of jurisdiction respondents emphasize the character of the Commission's order—a declaration of no jurisdiction—and argue that it is a "negative" order, that the plaintiffs actually sue to compel the Commission to take jurisdiction, and that their remedy is mandamus, maintainable only in the courts of the District of Columbia—the official residence of the Commission. Plaintiffs reply that since Rochester Tel. Corp. v. U. S., 1939, 307 U. S. 125, 135, 140, no distinction is to be made between negative and positive orders of the Commission. On the other hand we observe Manufacturers Ry. Co. v. U. S., 1917, 246 U. S. 457, 483 holding that the District Court is not permitted to review the action of the Commission in refusing "to fix divisions" of joint rates; Rochester Tel. Corp. v. U. S. notices but does not expressly overrule Manufacturers Ry. Co. v. U. S. in this regard, p. 140, footnote 23.

Part II of the Interstate Commerce Act squarely answers the question as to such orders under that chapter—"305(g). Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title: Provided, That where the Commission, in respect to any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party

in interest may file a bill of complaint with the appropriate District court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction." 49 USCA 305(g). We find nothing to make this section applicable to the chapter 1 duties of the Commission. As it was first enacted August 9, 1935, along with amendments to chapter 1, the implication is that no such mandative order is available in chapter 1 cases, though a District Court has power generally to issue mandatory injunctions in an appropriate situation.

However, we need not and do not pass upon this ground of the jurisdictional defense.

III. But we think that the Commission was correct in deciding that B & P was not in fact eligible to have rates of its own—not entitled to a division. For this position it relied on its unappealed July 7, 1952 opinion in Wood v. New York Central Railroad Co., No. 30294. There bondholders of The Peoria and Eastern Railway Company complained that neither Peoria nor the New York Central, its operating agent, had filed in the name of Peoria & Eastern "rates, fares and charges for transportation between points on its line" and had failed "to establish" for it through routes, joint rates and divisions pursuant to sections 1(4) and 15(6) of the Interstate Commerce Act. Peoria & Eastern's properties consisted of a line of railroad extending 212 miles and "all necessary equipment for common-carrier operations." It had been completely operated first by the Big Four railroads and then by the New York Central since 1890. Analyzing the Act's definition of "common carrier" and observing its emphasis upon " transportation" as the key for ascertaining what railroads must file and be assigned tariffs of rates and divisions, the Commission reached the opinion that the compulsions of the Act applied only "to carriers actually

engaged in the transportation of passengers or property." Peoria & Eastern was held to have no such status.

A fortiori, then, B & P has none. Contrary to the plaintiffs' view, we see B & P as an integral part of the New Haven system. It is not an independent carrier in actual transportation. Nor are the rates now on file for New Haven joint rates with B & P. Legally B & P is still the "lessor", and New Haven is still the "lessee" of B & P's facilities; and they will continue so for as long as the Connecticut federal court allows the New Haven to run B & P under 77(c)(6) of the Bankruptcy Act or until the line is abandoned. In re New York, N. H. & H. R. Co., supra, 169 F. 2d 337, 339, footnote 9.

The ruling of the Commission in the instant proceeding and in the Wood case is undergirded by the decision of the Second Circuit in the New Haven-B & P-Old Colony litigation. Palmer v. Palmer, 1939, 104 F. 2d 161, 165. There Old Colony was aggrieved by the same segregation formula and demanded a division of rates under 15(6). Judge Hand, noting that 15(6) was but an implement of 1(4), declared that it applied only to roads under separate management.

The complaint will be dismissed, with costs to the defendants, and the action stricken from the docket.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil Action 1066

GROUP OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS

v.

INTERSTATE COMMERCE COMMISSION et als.

Order Taxing Costs

The defendant The New York, New Haven & Hartford Railroad Company having submitted its bill of costs to the Clerk, and the Clerk, after giving notice to all parties, having taxed the costs according to said bill, no other defendant having asserted a claim for costs, and the plaintiffs having moved the Court to disallow certain items of the costs claimed by The New York, New Haven & Hartford Railroad Company, and the Court treating the latter motion as a request for a review by the Court of the taxation of costs, upon consideration of the said bill of costs and of the said motion of the plaintiffs, the Court is of the opinion that this action was oppressive and vexatious and, for these reasons, that The New York, New Haven & Hartford Railroad Company is entitled to recover its reasonable attorneys' fees and expenses incident to the defense of this action, as well as the costs fixed by statute, and to this the Court ascertains such fees, expenses and costs to be in the following amounts, and accordingly orders that The New York, New Haven & Hartford Railroad Company recover of the plaintiffs the said amounts as follows:

Attorneys' fees	$1500.00
Disbursements for printing brief	387.50
Railroad fares	26.71
Taxi fares and hotel accommodations	9.90
Fees for exemplification and copies of papers	6.80
Docket fees under § 1923, Title 28, U. S. Code	20.00
Total	$1,950.91

(s) ARMISTEAD M. DOBIE
United States Circuit Judge

(s) STERLING HUTCHESON
United States District Judge

(s) ALBERT V. BRYAN
United States District Judge

June 15, 1955.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

At Alexandria

Civil No. 1066

GROUP OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS

v.

INTERSTATE COMMERCE COMMISSION ET AL.

Order Denying Motions of Plaintiffs Filed June 24 and June 27, 1955, and Petition of Trustee Filed June 21, 1955

Upon consideration of the motions of the plaintiffs to supplement the complaint, to amend the opinion of the Court, to amend the order taxing costs, and to vacate paragraph 3 of the Court's order of May 6, 1955 and to reconsider plaintiff's motion of April 11, 1955; upon consideration of the petition of Charles W. Mulcahy, Trustee in reorganization of the Boston and Providence Railroad Corporation; and upon consideration of the responses of the United States and the Interstate Commerce Commission thereto; it is

ORDERED that all of said motions and the said petition be denied.

/s/ ARMISTEAD M. DOBIE
United States Circuit Judge

/s/ STERLING HUTCHESON
United States District Judge

/s/ ALBERT V. BRYAN
United States District Judge

July 1st, 1955.

OCT 28 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

---

MOTION TO AFFIRM

WILLIAM T. GRIFFIN,
233 Broadway,
New York City, New York.

HERBERT BURSTEIN,
135 Broadway,
New York City, New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

---

MOTION TO AFFIRM

Appellee, The New York, New Haven and Hartford Railroad Company, moves pursuant to Rule 16, Paragraph 1(c) of the Revised Rules of this Court that the orders and judgment of the District Court be affirmed.

Statement

This purports to be a direct appeal from certain final orders entered on March 31, 1955, May 6, 1955, June 15, 1955 and July 1, 1955,[1] by a three judge District Court, convened pursuant to 28 U. S. C. 2284, 2325. Primarily, appellants seek review of the order of March 31, 1955, which dismissed the complaint in appellants' action to set aside an order of the Interstate Commerce Commission dated July 13, 1954 (Jurisdictional Statement, Appendix, p. 1a).

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[1] Appellants state (Jurisdictional Statement, p. 3) that they filed "their notice of appeal from all of the foregoing orders on July 5, 1955." While a timely motion for reargument or rehearing may toll the time for appeal from the original order, the order of May 6, 1955, denying the motion and the order of July 1, 1955 (Jurisdictional Statement, Appendix 15a) are not appealable as separate and distinct final orders. The denial of the motion for rehearing or reargument merely suspends the date when the original order becomes final for purposes of review. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U. S. 206; *Bowman* v. *Loperna*, 311 U. S. 262; *National Labor Relations Board* v. *Mackay Radio & Teleg. Co.*, 304 U. S. 333; Moreover, appellants have no standing to seek review of the order of the District Court denying the application of the trustee of the Boston and Providence Railroad Corporation for leave to intervene. It is not clear whether appellants also seek review of that part of the order of May 6, 1955 which granted a motion by a stockholder of Boston and Providence to intervene (Jurisdictional Statement, p. 25). So, too, the order of July 1, 1955, denying appellants' motion to amend the order of June 15, 1955 which taxed appellants with costs is not appealable. As to that part of the order which denied leave to file a supplemental pleading under Rule 15(d) of the Federal Rules of Civil Procedure (Jurisdictional Statement, p. 26) appellants suggest no basis for a remand of the case to permit the filing of a supplemental pleading. *Southern Pac. Co.* v. *Conway*, 115 F. (2d) 746, 751 (C.A. 9th). Essentially, therefore, the appeal is directed to the order of March 31, 1955 which dismissed the appellants' complaint.

History of the Litigation

A brief history of this litigation will serve to bring the issues into focus.

On March 17, 1954, four stockholders of the Boston and Providence Railroad Corporation (herein called "Boston & Providence") filed a complaint with the Interstate Commerce Commission (herein called the "Commission") against The New York, New Haven and Hartford Railroad Company (herein called "New Haven") requesting an investigation and an order under Section 15(6) of the Interstate Commerce Act (49 U. S. C. Sec. 15(6)) fixing and prescribing a division of joint rates between Boston & Providence and New Haven (Jurisdictional Statement, p. 22).

By an order, dated July 13, 1954, the Commission dismissed the complaint on the grounds that it had no authority to prescribe a division of rates in the absence of joint rates between Boston & Providence and New Haven and that there was no reasonable ground for further investigation under Section 13(1) of the Interstate Commerce Act (Jurisdictional Statement, Appendix p. 1a).

The appellants then instituted an action to set aside the Commission's order of July 13, 1954, but on March 31, 1955, a three-judge District Court dismissed the complaint (Jurisdictional Statement, p. 23; Appendix, p. 2a, et seq.).

In its careful and comprehensive opinion, the District Court reviewed all of the contentions advanced by appellants and concluded that since Boston & Providence was not a carrier and does not have joint rates with New Haven, it is not entitled to a division of rates and, accordingly, the Commission had no authority to order it (Jurisdictional Statement, Appendix pp. 11a-12a). While the District Court held that appellants had no standing to maintain the action (Jurisdictional Statement, Appendix pp. 8a-9a) it nevertheless considered and disposed of the

case on the merits (Jurisdictional Statement, Appendix pp. 9a-12a).

In this appeal, appellants seek to relitigate issues previously considered and decided by the Court of Appeals for the Second Circuit and by this Court. *Palmer* v. *Warren*, 108 F. 2d (C.A. 2) 164; *Warren* v. *Palmer*, 310 U.S. 132; *In re New York, N. H. & H. R. Co.*, 169 F. 2d 337 (C.A. 2), cert. den. 335 U. S. 867.

A brief review of certain essential facts and the governing decisional precedents is persuasive that this appeal presents no substantial question which warrants further review by this Court.

The Background Facts

In 1888, Boston and Providence leased all of its properties to the Old Colony Railroad Company (herein called "Old Colony") for a term of ninety-nine years, at an annual rental of $400,000, plus bond interest, taxes and $3,000 for organization expenses.

In 1893, New Haven leased the properties of Old Colony, including Old Colony's leasehold interests in Boston and Providence, under a ninety-nine year lease. Since 1893, the Boston & Providence's line of railroad has constituted part of the main line of New Haven's system between Boston and New York.

On October 23, 1935, New Haven filed a petition in the United States District Court for the District of Connecticut for a reorganization in accordance with Section 77 of the Bankruptcy Act (11 U. S. C. Sec. 205).

On June 2, 1936, New Haven's trustees rejected the lease of the Old Colony's properties.

On June 3, 1936, Old Colony filed its petition for reorganization in the same Connecticut court. The Court appointed the trustees of New Haven trustees of Old Colony. On June

18, 1936, the Court directed the trustees of New Haven to operate Old Colony, the operation being for the account of Old Colony.

On May 25, 1938, the Connecticut District Court entered an order, pursuant to Section 77(c)(10) of the Bankruptcy Act (11 U. S. C. Sec. 205(c)(10)) approving a formula submitted by New Haven's trustees which segregated and allocated the earnings and expenses among New Haven and various mortgaged and leased lines, including Old Colony and Boston & Providence.[2] No appeal was ever taken from this order.

On July 19, 1938, the trustees of Old Colony, upon direction of the Court, rejected the lease of Boston & Providence but continued to operate the road for the account of Boston & Providence pursuant to Section 77(c)(6) of the Bankruptcy Act (11 U. S. C. Sec. 205(c)(6)). Since that date, New Haven's trustees have continued to operate Boston & Providence's line of railroad.[3]

On August 4, 1938, a petition for the reorganization of Boston & Providence, under Section 77 of the Bankruptcy Act (11 U. S. C. Sec. 205) was filed in the United States District Court for the District of Massachusetts. *Boston & Providence Railroad Corporation Reorganization*, 239 I. C. C. 465.

On September 11, 1947, the Connecticut District Court entered a consummation order and final decree in the New Haven reorganization proceedings and the joint trustees were discharged. Under the terms of the final decree, New Haven was to continue to operate Boston & Providence,

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[2] A detailed analysis of the trustees' method of segregation and allocation (which was referred to the Commission for review and recommendation) is set forth in *New York, New Haven & Hartford Railroad Company Reorganization*, 224 I.C.C. 723, 725-729. This formula was approved by the Commission.

[3] *Boston & Providence Railroad Corporation Reorganization*, 239 I.C.C. 465, 466; *New York, New Haven and Hartford Railroad Company, Reorganization*, 224 I.C.C. 723; *Warren* v. *Palmer*, 310 U. S. 132, 135-136; Jurisdictional Statement, pages 13 to 16.

subject to the reserved jurisdiction of the Court to act on all matters concerning claims between the reorganized New Haven and Boston & Providence arising out of the plan of reorganization or out of the operation of the lines of Boston & Providence by the reorganized New Haven. The order and final decree were affirmed on June 29, 1948, upon an appeal taken by the trustee of the Boston & Providence. *In re New York N. H. & H. R. Co.*, 169 F. 2d 337 (C.A. 2), cert. den. 335 U. S. 867.

The reorganization of Boston & Providence is not yet completed and New Haven continues to operate the former's lines subject to the continuing jurisdiction of the Connecticut District Court.

Questions Presented

(A) Did the District Court err when it dismissed the complaint on the ground that the Commission correctly concluded that it had no jurisdiction to prescribe a division of rates in the absence of joint rates between Boston & Providence and New Haven and that appellants had no standing to institute and maintain the suit in the District Court?

(B) Did the District Court err in taxing extraordinary costs in favor of New Haven.

Argument

1. Appellants' principal contention is that the Commission has the sole jurisdiction over a division of rates between Boston & Providence and New Haven and is under a duty to exercise that power notwithstanding the reservation, by the Connecticut District Court, of jurisdiction to pass upon the accounts between Boston & Providence and New Haven (Jurisdictional Statement, pp. 28-30). Apart from the fact that appellants' construction of the powers reserved to the Connecticut District Court is clearly negated by the decision in *In re New York, N. H. & H. R. Co.*,

169 F. (2d) 337 (C.A. 2), cert. den. 335 U. S. 867, its reliance upon Section 15(6) of the Interstate Commerce Act (herein called the "Act") is misplaced.

When appellants filed their complaint with the Commission, they sought, obviously, an order prescribing a division of rates under Section 15(6) of the Act. The Commission denied relief and dismissed the complaint, not because it assumed, as appellants suggest, that Section 77 of the Bankruptcy Act supersedes the Interstate Commerce Act (49 U. S. C. Sec. 1 et seq.) or forecloses a proceeding under Section 15(6) of the Interstate Commerce Act (Jurisdictional Statement, pp. 26-28) but for want of authority (Jurisdictional Statement, Appendix p. 1a).[4]

The District Court rejected the appellants' complaint to vacate the Commission's order for the reason, among others, that the relief sought was an order directing the Commission to "require New Haven to account to B & P in a manner other than by the formula adopted therefor by the District Court in Connecticut when the formula has the approval of the Commission and the Connecticut Court's authority to ascertain the amounts, if any, due to B & P has been sustained by the Court of Appeals for the Second Circuit as well as by the Supreme Court" (Jurisdictional Statement, p. 9a).

Clearly, the District Court had "neither the right nor the jurisdiction to grant" the relief sought by appellants (Jurisdictional Statement, Appendix p. 9a). To do so would amount to reversal of the May 25, 1938 order of the Connecticut District Court which confirmed, with the approval of the Commission, a segregation formula. No appeal had ever been taken from this order.

Moreover, to grant the relief sought by appellants would be tantamount to a vacatur of the Connecticut District

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[4] In *Warren* v. *Palmer*, 310 U. S. 132, 138 this Court pointed out that: "The judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations."

Court's final decree of September 11, 1947, which was affirmed by the Court of Appeals for the Second Circuit. *In re New York, N. H. & H. R. Co.*, 169 F. 2d 337 (C.A. 2), cert. den. 335 U. S. 867.

The Commission's order of July 13, 1954 (Jurisdictional Statement, Appendix p. 1a) is plainly correct, as an analysis of the Act proves.[5]

Section 1(3)(a), read with Section 1(1)(a), of the Act defines a common carrier to include persons engaged in transportation of property or passengers for hire. A "railroad" is defined in terms of facilities. Transportation embraces the instrumentalities and facilities of shipment or carriage, the delivery of freight and the furnishing of transportation facilities to shippers upon request. *United States* v. *Baltimore and Ohio Railroad Company, et al.*, 333 U. S. 169, 176; *Secretary of Agriculture of the United States* v. *United States, etc.*, 347 U. S. 645, 647; *General American Tank Car Corporation* v. *El Dorado Terminal Company*, 308 U. S. 422, 428, rehearing denied 309 U. S. 694.

Boston & Providence does not meet the statutory or decisional standards for an operating railroad and carries on no railroad operations. That Boston & Providence is not a carrier is evidenced by the fact that it has neither operating personnel nor equipment nor facilities for transportation. *The Boston & Providence Railroad Corporation Reorganization*, 239 I. C. C. 465, 379, 290 I. C. C. 363, 290 I. C. C. 404.

Section 1(4) of the Act requires every railroad to furnish transportation, to establish through routes with other railroads, to establish rates applicable both to transportation over the railroad's own lines and over a combination

[5] Provisions of the Act other than those set forth in the Jurisdictional Statement, pp. 5-6, are reprinted in the Appendix to this Motion (pp. 15-18, infra).

of lines in a through route arrangement and to establish a just and equitable division of joint rates.

Under Section 6(1) of the Act,[6] all railroads must file, with the Commission, schedules of rates covering transportation over its own route, and, where a through route and a joint rate with another railroad has been established, schedules showing the joint rates covering transportation between points on its own route and on the route of a connecting carrier. Where a joint rate has not been established, all the railroads participating in the through route arrangement, must file separately established rates applicable to the through transportation.

Section 15(3) of the Act authorizes the Commission to establish through routes and joint rates and the Commission is authorized, by the provision of Section 15(6), to prescribe "just, reasonable and equitable divisions" of joint rates where, after hearing upon a complaint or the Commission's own motion. it is determined that existing divisions are or will be unjust and inequitable.

Sections 1(1)(a), 1(3)(a), 6(1), 6(3), 15(3), as well as Sections 1(4) and 15(6) of the Act, must be integrated into a coherent pattern. *Palmer* v. *Palmer,* 104 F. 2d (C.A. 2) 161 cert. den. 308 U. S. 590.

Proceedings under Section 15(6) of the Act have always been bottomed upon joint rates which have been established, either voluntarily, pursuant to Section 1(4), or by order of the Commission, as prescribed in Section 15(3). *Thompson* v. *Baltimore & O. R. Co., et al.,* 59 F. Supp. 21, 33-34, modified on other grounds, 155 F. (2d) 767, cert. den. 329 U. S. 761, motion overruled 72 F. Supp. 65, cert. den. 329 U. S. 762. *Backus-Brooks Co.* v. *Northern Pacific R. Co.,* 21 F. (2d) 4, cert. den. 275 U. S. 562; *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274.

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[6] Under Section 6(3) of the Act changes in joint rates are subject to the jurisdiction of the Commission.

A non-operating railroad, like Boston & Providence, which has no equipment, provides no transportation service and publishes neither individual nor joint fares, cannot divide a joint rate which does not exist. *Boston & Providence Reorganization Proceeding,* 290 I. C. C. 404, 410-412. Revenue from a service which is not covered by a joint rate cannot be divided by order of the Commission under Section 15(6). *Interstate Commerce Commission* v. *Hoboken Manufacturers R. Co.,* 320 U. S. 368, rehearing denied 321 U. S. 801. This accords with the Commission's consistent construction of the statute. *Wood* v. *New York Central R. Co.,* 286 I. C. C. 373; *Canton Railroad Company* v. *Ann Arbor Railroad Company, et al.,* 163 I. C. C. 263.

This Court has repeatedly held that the contemporaneous and long-settled construction of an Act by the agency charged with its enforcement is entitled to great weight. *United States* v. *American Trucking Associations,* 310 U. S. 534, 549; *United States* v. *Mo. Pac. R. Co.,* 278 U. S. 269, 280; *United States* v. *Alabama Railroad Co.,* 142 U. S. 615.[7]

The appellants incorrectly assume that Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) grants an extraordinary right of review. On the contrary, Section 10 of the Administrative Procedure Act is declaratory of the pre-existing law concerning judicial review. *Attorney General's Manual on the Administrative Procedure* Act, page 136.

2. For reasons hereafter stated, it appears evident that the appellants have no standing to prosecute this suit. As the District Court suggested, the gravamen of the suit is to compel the Commission to assume jurisdiction and the

[7] Appellants rely upon the decisions in *U. S.* v. *Great Northern R. Co.,* 343 U. S. 562 (Jurisdictional Statement, p. 27) and *N. J. & N. Y. Railway Co. (Peter Duryee, Trustee)* v. *Erie Railroad Company, et al.,* 292 I.C.C. 479, reversing 288 I.C.C. 219. In both cases, there were joint rates in existence. Consequently, the power of the Commission under 15(6) is self-evident.

remedy, if any, is by way of mandamus maintainable in the Courts for the District of Columbia (Jurisdictional Statement, Appendix p. 10a). *Interstate Commerce Commission* v. *U. S. ex rel. Humboldt Steamship Co.*, 224 U. S. 474; *U. S. ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638.[8]

3. The District Court correctly concluded that the appellants had no standing to institute and maintain an action to review the order of the Commission (Jurisdictional Statement, pp. 8a-9a). Assuming, but not conceding, that the directors of the Boston & Providence are "legally inactive" (Jurisdictional Statement, p. 40) the stockholders are not thereby qualified to institute a derivative stockholders suit. The fact that anyone may file a complaint with the Commission, does not give that person standing to institute suit in a District Court. *Pittsburgh & W. Va. Railway* v. *United States*, 281 U. S. 479.

Rule 23(b) of the Federal Rules of Civil Procedure, prescribes a method for the institution of a derivative stockholders' action. Merely because the action, in this case,

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[8] In *Rochester Telephone Corporation* v. *United States, etc.*, 307 U. S. 125, 129, this Court discussed three categories of negative orders. While it would appear that the Commission's order falls within the third group of cases reviewed by the Court, an analysis of the facts indicates that the case does not involve: "review * * * of an action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person" (135). The relief sought by the appellants does not affect the appellants and does not relate to "conduct with reference" to appellants. The division of rates would affect the appellants derivatively. Only Boston & Providence would be affected since any division of revenues would inure to the benefit of the Boston & Providence and not to the appellants. While the negative nature of the order would not preclude action by Boston & Providence, the principle of the Rochester case does not accord the right of review to persons who are otherwise without standing. The appellants' status may be equated with that of a taxpayer complaining of a wrong to the public generally. *Massachusetts* v. *Mellon*, 262 U. S. 447.

was instituted before a three-judge court does not nullify the provisions of Rule 23(b).[9]

A derivative stockholders suit may not be maintained unless the plaintiff stockholders have exhausted every remedy within the corporation. *Lucking* v. *Delano,* 129 F. 2d 283 (C.A. 6); *Long* v. *Stites,* 88 F. 2d 554 (C.A. 6), cert. den. 301 U. S. 706. Even where futility is pleaded, the corporation is the real party in interest and is an indispensable party. *Koster* v. (*American*) *Lumberman's Mutual Casualty Company,* 330 U. S. 518.

In the case at bar, there is no showing that an application to the corporation or the trustee of Boston & Providence to maintain the suit to vacate the Commission's order would have been futile. On the contrary, it appears that the trustee of the Boston & Providence sought leave to intervene as a plaintiff, but this application was denied by the District Court and no appeal was taken by the trustee (Jurisdictional Statement, p. 3). Appellants' suggestion that Rule 23(b) of the Rules of Civil Procedure applies only to active corporations is manifestly without merit. A corporation in reorganization is not foreclosed from bringing a stockholders derivative action. The "trustee stands in the place of the corporate entity." *Zeleznik* v. *Grand Rivera Theater Co.,* 128 F. 2d 533, 536 (C.A. 6).

4. The taxing of extraordinary costs was clearly within the discretion of the District Court. The allegation by the appellants that the taxing of extraordinary costs has no

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[9] Sections 1336, 1398, 2321 to 2325 of Title 28 speak in terms of "a civil action." Section 1336 of Title 28 (62 Stat. 931) which is the fundamental statute is based on the provisions of former Section 41(27)(28) of Title 28, U. S. Code, March 31, 1911, 36 Stat. 1091, 1148; October 22, 1913, 38 Stat. 219. The codifiers substituted the words "any civil action" for "all cases" and "cases" in order to conform with Rule 2 of the Federal Rules of Civil Procedure. Clearly, Section 1336 must be integrated with the Federal Rules of Civil Procedure and except as otherwise specifically provided, all of the Federal Rules of Civil Procedure are applicable.

precedent in the Federal courts is erroneous (Jurisdictional Statement, p. 42). The appellants have set forth nothing in the Jurisdictional Statement beyond the order of the District Court (Jurisdictional Statement, Appendix 13a). But the papers on appeal disclose clearly the substantial grounds for the order taxing the costs. It was on the basis of a detailed review of the repetitive pleadings and petitions of the appellants and the fact that many of the issues had been litigated and relitigated that the District Court, in the exercise of its discretion, awarded extraordinary costs (Jurisdictional Statement, p. 8a).

The District Court has the equitable powers to tax costs against the unsuccessful party and include therein, reasonable attorneys' fees and expenses. *Sprague* v. *Ticonic National Bank,* 307 U. S. 161; *Guardian Trust et al.* v. *Kansas City Southern Ry. Co.,* 28 F. 2d 233 (C.A. 8), reversed on other grounds, 281 U. S. 1; *In re Swartz,* 130 F. 2d 229 (C.A. 7); *Gazan* v. *Vadsco Sales Corporation,* 6 F. Supp. 568 (E.D.N.Y.).

Conclusion

For all of the reasons herein set forth and because this appeal presents no substantial question, the order and judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

INTERSTATE COMMERCE ACT

Section 1 (1)(a) (49 U. S. C., Section 1 (1)(a)):

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment.

Section 1 (3)(a) (49 U. S. C., Section 1 (3)(a)):

(3) (a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this part it shall be held to mean "common carrier." The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of ship-

ment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof.

Section 6 (1) (49 U. S. C., Section 6 (1)):

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares,

and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Section 6 (2) (49 U. S. C., Section 6 (2)):

(2) Any common carrier subject to the provisions of this part receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this part, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

Section 6(3) (49 U. S. C., Section 6(3)):

(3) No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commis-

sion and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: Provided, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions; Provided further, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, APPELLANTS

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission, appellees, move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment, entered on March 31, 1955, by a three-judge Dis-

trict Court convened pursuant to 28 U.S.C. 2284 and 2325, unanimously dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission.

The contested order, which was entered by the Commission on July 13, 1954, dismissed a complaint filed with the Commission by four stockholders of the Boston & Providence Railroad Corporation ("B & P") against the New York, New Haven and Hartford Railroad Company ("New Haven"). The complaint requested the Commission to determine and prescribe fair divisions of joint rates under § 15(6) of the Interstate Commerce Act (49 U.S.C. 15(6)) for the transportation of through traffic over the lines of the two rail carriers. The Commission dismissed the complaint upon motion of the defendant, New Haven, for the reason that no joint rates within the meaning of § 15(6) existed between the two carriers (Jurisdictional Statement, Appendix, p. 1a).

The District Court, in dismissing appellants' complaint, sustained the Commission's order on three independent grounds: (1) that appellants have no standing to bring the action; (2) that the bankruptcy court supervising the reorganization of the New Haven has exclusive jurisdiction to determine the amounts, if any, due to B & P; and (3) that the Commission was correct in its construction of § 15(6) (Jurisdictional Statement, Appendix, pp. 2a-12a).

The pertinent facts may be summarized as follows:

B & P is a non-operating railroad. It has no operating organization, no rolling stock, and no facilities for repair and maintenance. In 1888, B & P leased its properties, consisting largely of trackage, to the Old Colony Railroad Company ("Old Colony") for a term of 99 years. Five years later, in 1893, Old Colony leased all its properties, including its leasehold interests in B & P, to the New Haven for 99 years. Since then, the B & P properties have been continuously operated by the New Haven or its trustee.

In 1935, the New Haven filed a petition for reorganization under § 77 of the Bankruptcy Act in the United States District Court for the District of Connecticut. As part of the reorganization, the New Haven trustees rejected the Old Colony lease. Shortly thereafter the court entered an order directing the New Haven trustees to continue operation of Old Colony pursuant to § 77 (c)(6) of the Bankruptcy Act.

In 1938, B & P filed a similar petition for reorganization in the United States District Court for the District of Massachusetts.

The Connecticut court, finding it necessary to make some allocation of earnings and expenses among the component parts of the New Haven system, referred to the Commission, pursuant to § 77(c)(10) of the Bankruptcy Act, a so-called

segregation formula proposed by the New Haven trustees. The Commission reported to the court that the trustees' formula "is as fair and equitable as the circumstances will permit." *New York, N.H. & H. R. Co. Reorganization,* 224 I.C.C. 723 (1938). The segregation formula was confirmed by order of the Connecticut court, and no appeal was taken from that order. The court's authority to ascertain the amounts, if any, due B & P under the formula was upheld in *Palmer* v. *Warren,* 108 F. 2d 164, affirmed, 310 U.S. 132 (1939).

In 1947, the Connecticut court entered a final decree in the New Haven reorganization proceedings, in which it expressly reserved jurisdiction to consider and act on all questions respecting intercompany claims arising out of the operation of B & P properties by the New Haven. B & P appealed from this decree, but it was affirmed by the Court of Appeals for the Second Circuit. *In re New York, N.H. & H. R. Co.,* 169 F. 2d 337, certiorari denied, 335 U.S. 867 (1948).

The reorganization of B & P is still pending. On January 5, 1954, the Commission approved a plan providing for a sale of B & P to the New Haven. 290 I.C.C. 363; 290 I.C.C. 404. The plan, however, has not yet been judicially confirmed.

Appellants instituted the present proceedings before the Commission on March 17, 1954.

ARGUMENT

The District Court correctly held (1) that appellant shareholders lack standing to bring this

action and (2) that the bankruptcy court supervising New Haven's reorganization has exclusive jurisdiction to determine the amounts, if any, to which B & P is entitled. Each of these holdings is sufficient to require affirmance of the judgment below without reaching the District Court's third alternative ground of decision, its construction of § 15(6).[1] We submit, therefore, that this motion to affirm should be granted.

1. Appellants lack standing to maintain this suit. They allege in their complaint that they are a group of B & P stockholders who together hold 1,200 of the 33,291 outstanding shares of the corporation's capital stock. We contend, however, that they have not shown such injury as would entitle them to challenge the Commission's order.

The mere fact that appellants have a personal economic interest in the amount of returns they receive on their stock does not confer the right upon them to maintain this action. They do not obtain standing to sue simply from the fact that they are B & P stockholders. In *Pittsburgh & W. Va. Ry.* v. *United States,* 281 U.S. 479, 487, this Court denied the standing of a minority stockholder in a railroad corporation to challenge a Commission order which allegedly threatened the financial stability of the corporation. The Court said that "[t]he injury feared is the indirect harm which may result to every stockholder from harm

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[1] As we indicate below (pp. 11-12), the Commission is of the view that the District Court correctly construed § 15(6).

to the corporation. Such stockholder's interest is insufficient to give the Pittsburgh a standing independently to institute suit to annul this order." 281 U.S. at 487-488. See also *Schenley Distillers Corp.* v. *United States,* 326 U.S. 432, 435. This "accepted doctrine" was reaffirmed in *American Power & Light Co.* v. *Securities & Exchange Commission,* 325 U.S. 385, 388, 389, but was found inapplicable there to a suit by "a stockholder having a substantial financial or economic interest distinct from that of the corporation which is directly and adversely affected by an order of the Commission, irrespective of any effect the order may have on the corporation * * *." In the instant case, as in the *Pittsburgh & West Virginia* case, appellants' interest is solely derivative, is identical with that of the corporation, and is shared in common with all other B & P stockholders.

In an effort to avoid the effect of the rule enunciated in the *Pittsburgh & West Virginia* case, appellants stress that they were the moving party in the administrative proceeding and that the Commission at no time challenged their standing in that proceeding. But this argument assumes that administrative criteria of standing are identical with judicial criteria of standing. The mere fact that a party is permitted to seek relief before an administrative agency does not *ipso facto* entitle it to judicial review of the agency's denial of relief. See *Pittsburgh & West Virginia Ry. Co.* v. *United States, supra,* at 486.[2] To obtain such review,

[2] For other cases in which parties to an administrative proceeding have been denied standing to obtain review, see

injury to a distinct legal interest of the plaintiff is essential, regardless of whether it was a prerequisite to obtaining agency action. One principal difference, of course, is that the constitutional "case or controversy" requirement is not applicable to administrative proceedings. Cf. *Doremus* v. *Board of Education*, 342 U.S. 429. In any event, appellants, having selected this route and having traveled it on their own without the support of the corporation or the trustee,[3] are themselves responsible for any hardship imposed on them by the denial of judicial review. Despite the fact that there could be no question as to the standing of the trustee to institute the proceedings in the Commission and then obtain review of the Commission's order, appellants have failed to show that they could not adequately protect their rights by seeking a court order compelling the trustee to join in their effort before the Commission.

Nor is appellants' position improved by treating the action as a stockholders' derivative suit. There is no allegation in the complaint that they have been authorized by the court having supervision of the pending reorganization proceeding, or by the B & P trustee, to institute this suit. There

Boston Tow Boat Co. v. *United States*, 321 U.S. 632; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Moffat Tunnel League* v. *United States*, 289 U.S. 113; *Sprunt & Son* v. *United States*, 281 U.S. 249.

[3] On June 27, 1955, approximately three months after the District Court entered its final judgment of March 31, 1955, dismissing the complaint, the trustee for B & P submitted to the court a petition for intervention, which was denied on July 12, 1955.

is also no allegation that they sought and were refused such permission. Appellants sue to establish a right allegedly belonging to the corporation. Their complaint, however, fails to satisfy the requirements of a derivative action. See Rule 23 (b), F.R. Civ. P.[4] As the District Court pointed out, these requirements are not waived by the statutes governing this suit, 28 U.S.C. 1336 and 2321.

2. The District Court correctly held that it lacked the power to grant the relief sought.

Since 1938 the authority of the Connecticut court to allocate earnings and expenses among the component parts of the New Haven system under the so-called segregation formula has been repeatedly acknowledged by the Commission (224 I.C.C. 723; 275 I.C.C. 617) and upheld by the Court of Appeals for the Second Circuit (108 F. 2d 164; 169 F. 2d 337) and this Court (310 U.S. 132). Under these circumstances, the present action appears to be but a thinly-veiled collateral attack upon the segregation formula and an attempt to circumvent the jurisdiction of the Connecticut court. If the appellants should prevail in this action, the New

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[4] ". . . The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort." If the corporation is in bankruptcy or receivership, recourse must be had to the trustee or receiver in lieu of the usual management. See, *e.g.*, *Wachsman* v. *Tobacco Products Corp.*, 129 F. 2d 815 (C.A. 3); *Lucking* v. *Delano*, 129 F. 2d 283 (C.A. 6).

Haven would be required to account to B & P in a manner other than that prescribed by the elaborate plan so carefully and tediously worked out over the years by the Commission, the parties, and the Connecticut court. The effect would be to render that plan largely nugatory.

Assuming, but without conceding, that B & P might in some circumstances have a just claim against New Haven under § 15(6), the Commission nevertheless properly denied a division here. Pending determination of B & P's claim against New Haven in the bankruptcy proceedings, any effort by the Commission to fix a division between B & P and New Haven in the kind of independent proceeding appellants have attempted would at best duplicate and at worst revise the inter-company allocation which the bankruptcy court must make. Similarly, until the bankruptcy claim is determined, it cannot be known whether the segregation formula in its actual application to B & P will in fact be confiscatory, as appellants contend. And if it is confiscatory, relief can be accorded in the bankruptcy proceeding; for, as the Second Circuit has held, B & P "is free to oppose the application by the District Court of that formula to the liquidation of its account" with New Haven. *Palmer* v. *Warren,* 108 F. 2d 164, 169 (C.A. 2) (on rehearing), affirmed, 310 U.S. 132.

Viewed in this light, the issue is essentially one of priority between two possible forums. The bankruptcy court having first lawfully taken jurisdiction, its jurisdiction cannot be defeated at this late date. As Judge Learned Hand noted in a com-

panion case (*Palmer* v. *Palmer,* 104 F. 2d 161, 165, certiorari denied, 308 U.S. 590), claims under § 15(6) could have been presented to the Commission at the time the Commission was asked to recommend a formula. Neither Old Colony nor B & P took such action, however, and they should be barred from doing so now, at least until the bankruptcy proceeding has run its normal course.[5]

Moreover, the weight to be given to the segregation formula in B & P's reorganization was one of the principal issues before the Commission in its recent consideration and approval of the latest plan for the debtor's reorganization. See 290 I.C.C. 363, 379-392; 290 I.C.C. 404-412. The Commission held (p. 412) that although the segregation formula was one of the factors upon which it had fixed the debtor's valuation for reorganization purposes, the formula could not serve as the "sole indication." See also 290 I.C.C. at 391. The Commission also specifically rejected the contention of B & P stockholders that the formula was not ap-

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[5] The alleged conflict between *Palmer* v. *Palmer* and the instant case is illusory. See Jurisdictional Statement, p. 30. In its context the quoted excerpt from Judge Hand's opinion most certainly does not authorize an independent proceeding under § 15(6) pending the bankruptcy court's determination under the segregation formula. At most the statement means only that such a proceeding *could* have been brought *prior* to adoption of the formula. In the same paragraph Judge Hand stated that "we need not decide whether the Commission was bound by § 15(6) * * * because if the Commission had jurisdiction, the Old Colony was bound to submit its evidence to it, and *at that time* [*i.e.*, prior to adoption of the formula] to secure from it a proper recognition of its privileges under § 15(6)." 104 F. 2d at 165 (emphasis added).

plicable to B & P after its lease had been rejected by the New Haven, and that the Commission therefore had the "duty to establish divisions under the Interstate Commerce Act" (p. 410; see also p. 413). The debtor's plan is now before the Massachusetts District Court for confirmation, and appellants can urge before that court the very contentions which they seek to litigate in the instant proceeding.

3. The District Court also held that B & P was, in any event, not entitled to a division under § 15 (6). This section, the court concluded, applies only to independent carriers actually engaged in the transportation of passengers and property. B & P, on the other hand, is concededly neither independent nor itself engaged in transportation. The District Court's construction of § 15(6) is supported by the Commission's consistent view that it has no statutory authority to prescribe divisions of rates between carriers unless there are joint rates between such carriers (see *Wood* v. *New York Central R. Co.*, 286 I.C.C. 373[6]) and that of Judge Hand in related litigation (*Palmer* v. *Palmer*, 104 F. 2d 161, 165, certiorari denied, 308 U.S. 590).

The Commission submits that this construction of the Act is correct. However, since the first two grounds relied upon by the District Court are fully

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[6] *Accord: Canton Railroad Company* v. *Ann Arbor Railroad Company*, 163 I.C.C. 263, 265-7; *New York Dock Railway* v. *B. & O. Railroad Co.*, 73 I.C.C. 656, 662-3; *Morgantown & Kingwood Division*, 49 I.C.C. 540, 547.

dispositive of the case, it is unnecessary to reach the issue on this appeal. Wholly apart from this issue, a summary affirmance is warranted.

CONCLUSION

The judgment of the District Court is correct and should, without further briefs or argument, be affirmed.

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NOVEMBER, 1955

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 964999 G52

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

Appellants submit this brief under Rule 16 in opposition to the two motions of appellees to affirm the judgment and orders of the lower court. The New Haven Company, as the true adversary party and the only railroad appellee, filed one such motion. A second motion to affirm on some of the questions was filed on behalf of the United States and Interstate Commerce Commission. Both motions were filed under Rule 16—"on the ground that it is manifest

that the questions on which the decision of the cause depends are so unsubstantial as not to need any further argument."

ERRORS OF FACT IN APPELLEES' MOTIONS

The Government summary of facts (Motion, pp. 3-4) begins by stating that "B&P is a non-operating railroad." Appellants call the attention of the Court particularly to the fact that full public transportation service is provided on the Boston & Providence Railroad "for the account of" the Boston & Providence Corporation, which owns and bears the burden of the Boston & Providence railroad system franchises.[1]

It is true that the Boston & Providence Corporation does not own the title to any rolling stock now in use, but its railroad system is crowded with rolling stock, particularly inbound freight cars, for which the Corporation bears the full rental cost.

Contrary to the Government statement that the Corporation "has . . . no facilities for repair and maintenance", the Commission valuation records credit the Corporation with ownership of shops at Readville worth several million dollars, on which the maintenance of the New Haven equipment pool depends.

It is both misleading and mistaken for the Government to state that, "In 1888, B&P leased its properties *consisting largely of trackage* to the Old Colony Railroad Company for a term of 99 years." Actually the Boston & Providence Corporation leased a complete going-concern railroad system consisting, not of trackage,[2] but of its own railroads

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[1] The word "system" is generally used herein as a convenient but inexact term to designate an assembly of railroads or corporations having some common bond.

[2] "Trackage" is a term used in the railroad industry to denote a right to operate trains over another corporation's railroad on a contractual basis but without the right to possession.

held in fee, with complete freight and passenger terminals, rolling stock, tools and facilities for maintenance and repair, and with a complete operating organization.

The Government motion misleads in that it omits any reference to the rejection of the Boston & Providence lease by the Old Colony trustees at the order of the Connecticut court. The sequence of events was that the Connecticut court ordered the rejection of the Boston & Providence lease in July, 1938 which action then precipitated the Boston & Providence bankruptcy proceeding in August in Boston. (Jurisdiction Statement, pp. 16-17.)[3]

Nor can it be correctly stated as a fact (cf. Government motion, p. 4) that the Court of Appeals or this Court upheld the authority of the Connecticut court "to ascertain the amounts, if any, due the Boston & Providence Corporation *under the formula.*"

Appellants also take exception to the following statement in the New Haven Company's motion (p. 4) that,

> Since 1893, the Boston & Providence's main line of railroad has constituted part of the main line of New Haven's system between Boston and New York.

It would be correct to state that since 1893 the main line of the Boston & Providence Railroad has constituted part of the Shore Line Route from Boston to New York, bearing in mind that, from 1936 to July, 1938, the line was operated for the financial account of the Old Colony Railroad Company as lessee, and that since July, 1938, it has been operated for the separate financial account of the independent Boston & Providence Railroad Corporation rather than for the account of the New Haven Company.

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[3] The segregation formula had been considered by the Commission in April, while the Boston & Providence Corporation was still a lessor to Old Colony.

ARGUMENT

POINT I. IN REPLY TO THE ARGUMENT THAT THE APPELLANTS LACK STANDING

The appellants were pursuing their admitted statutory right when they filed their complaint and began this proceeding (which is now in its appellate stage) to invoke the protection of the Interstate Commerce Act. *United States* v. *New York Central R. Co.*, 272 U.S. 457; *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25; *Backus-Brooks* v. *Northern Pacific R. Co.*, 21 F. 2d 4, certiorari denied, 275 U.S. 562. The particular protection invoked was provided by Congress in the clauses of the Act regulating railroad company revenues, including divisions from through traffic, and granting broad rights of complaint.

The appellees, however, contend that the appellants lack standing in court to obtain review of the Commission's order, on the ground that their claim is derivative within the doctrine of *Pittsburgh & West Virginia R. Co.* v. *United States*, 281 U.S. 479.

The *Pittsburgh & West Virginia* decision, however, even assuming its applicability, did not establish a mechanical rule depriving stockholders of the right to obtain review of administrative orders solely because the formal impact of the order technically falls on their corporation. This has been made clear by the more recent opinion of this Court in *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U.S. 385. In that case an order of the S.E.C. ran against American Power & Light's subsidiary, the Florida Power & Light Company, and required a change in the latter's accounting which would diminish its earned surplus. The order had an impact on American Power & Light solely because of its stock interest in the Florida company. Nonetheless this Court held that American had an independent standing to obtain review, even though the Florida company itself had also taken an appeal, because while it was true that the order affected American only through its

stock interest in Florida, the legal and economic interest of American in receiving dividends from the earned surplus of the Florida company was *distinct* from the Florida company's interest in preserving its earned surplus and paying dividends therefrom. The Court stated that the protection of American's distinct interest should not be left to the discretion of the Florida company's management who might withdraw the Florida company's appeal.

In order to grant the stockholder standing, this Court did not require a conflict of interest between the stockholder and the corporation, but merely a difference.

The distinct economic and legal interest of the stockholders, and the importance of not leaving it to their corporation management to determine whether their rights should be vindicated, are far clearer in the present case than in the *American Power & Light* case. Nobody has ever doubted that the Boston & Providence Corporation is solvent in the bankruptcy sense. It is in reorganization only because the denial of fair divisions has effectively deprived it of income. The effect of the present proceeding would be to establish its right to income which would then establish its solvency in the equity sense and enable the stockholders to resume the control of the corporation. The stockholders' interest in vindicating their primary proprietary right as owners to control their corporation is far more clearly distinct from the interest of their corporation in the conduct of its business than American Power & Light's interest in receiving dividends was distinct from the interest of its Florida company in paying them.

Moreover, by denying divisions, and thus preventing the restoration of the solvency of the Boston & Providence Corporation, the Commission's order subjects its stockholders to the real possibility of a compulsory relinquishment of their interest in the Corporation and its assets by forced sale to the New Haven Company under the so-called plan of reorganization. The interest of the stockholders in re-

taining their interests in their Corporation is of course wholly distinct from any interest of the Corporation itself.

Not only are the interests of the stockholders more clearly distinct from the interest of their Corporation than was the case in the *American Power & Light* case, but the reasons for not forcing them to rely for vindication of their interests on the decisions and acts of the Corporation are far more compelling. In the *American Power & Light* case the subsidiary Florida company was under the direct and total control of American as the stockholder. In fact it too had sought judicial review of the administrative order. But the Boston & Providence Corporation is wholly inactive. For 17 years its directors have been holdovers or replacements by the inactive board. It is true that the Trustee sought intervention in this proceeding before the three-judge court. But his attempted intervention was delayed, and when it came it was half-hearted and reluctant. He has not even sought to review the denial of his petition to intervene.[4] Thus, whereas American Power & Light was faced only with a possibility that an appeal taken by a wholly-owned subsidiary might be withdrawn (yet that was deemed to justify its independent appeal as stockholder) the Boston & Providence stockholders are confronted with a *certainty* that if this appeal cannot be maintained there will be no review whatever of the administrative tribunal's order which so directly and adversely affects them.[5]

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[4] Appellants believe that the Trustee moved to intervene by the absolute right which the special intervention provision in the Urgent Deficiencies Act granted him "at any time." (Third paragraph of 28 U.S.C. § 2323. See *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 526-30. See the intervention of the National Industrial Traffic League before the Supreme Court in *Eastern Central Motor Carriers Association* v. *United States*, 321 U.S. 194, selected by Mr. Willey as a model Supreme Court intervention form in 1 West's Federal Forms, sec. 399.)

This issue is raised by Question 9 in the Jurisdictional Statement, pages 9-10, 38-41.

[5] It might conceivably be argued that it was necessary for appellants to have petitioned their reorganization court in Boston to

Moreover, the *Pittsburgh & West Virginia* decision did not hold, as asserted by the New Haven Company (Motion, p. 11) that "the fact that anyone may file a complaint with the Commission does not give that person standing to institute suit in a District Court." It holds instead that, "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting or actual threatened legal injury to it." 281 U.S. 479, 486.

The cases cited in the Government motion (pages 6-7, note 2) in support of the New Haven Company's view are all cases involving mere intervenors in the administrative proceedings. None is concerned with the right of a moving party having, as here, a direct and paramount interest in the relief requested. The contention that such a moving party does not have a right to obtain review of the order directed against him is clearly contrary to the principle recognized by this Court that,

> A party litigant should always have the right to follow his case to final judgment.
>
> *I.C.C.* v. *Oregon-Washington R. & N. Co.*, 288 U.S. 14, 26.

A denial of appellants' standing to bring this action would have the remarkable effect of holding that in the proceeding before the Commission the defendant but not the complainant was entitled to review of the Commission's

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require the trustee to prosecute the action for judicial review or else replace him with a trustee who would. But that would be wholly inconsistent with the *American Power & Light* decision, since American could far more readily and simply have required the Florida company's directors to act in accordance with American's interests or have them replaced with directors who would. As this Court clearly recognized, what is involved in this type of situation is a vindication of a distinct primary interest of the stockholders. Hence the formal requirements for a derivative action under Civil Rule 23 (b) are wholly inapplicable.

order. Such a holding would violate the provision of Section 10 of the Administrative Procedure Act, Title 5 U.S.C. § 1009, that "every agency action made reviewable by statute (such as the Urgent Deficiencies Act here) shall be subject to judicial review."

It would also violate the provision in Section 10 of the Administrative Procedure Act granting the right of review to persons "adversely affected or aggrieved" by agency action.[6] The appellants were certainly both adversely affected and aggrieved by the order of the Commission, even if,—as was not the case—they had suffered no "legal wrong" in being denied the relief sought in their complaint. *American President Line, Ltd.* v. *Federal Maritime Board*, 112 F. Supp. 346.

In sum, to deny standing to appellants in the circumstances would deny their rights as moving parties to pursue their cause to final judgment; would disregard their right to oppose an order having a direct, distinct, and adverse effect upon their interest; would disregard their rights under the Administrative Procedure Act; and would deny them the opportunity to protect their own interests because of a fiction that the substantive rights at issue belong to a corporation or trustee which has for all practical purposes given them up. Such a denial would find no support in any precedent cited by the court below or by any appellee.

There of course can be no question as to the standing of appellants to raise in this Court the propriety of the action of the court below in taxing extraordinary costs against them. Both because of the clear impropriety of this action

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[6] Section 10(a) provides as follows:

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, *or adversely affected or aggrieved by such action* within the meaning of any relevant statute, shall be entitled to judicial review thereof. 5 U.S.C. § 1009. Emphasis added.

under the circumstances of this case and because we do not wish to obscure the basic substantive issues on this appeal we shall rest, as to this Question, on the treatment in the Jurisdictional Statement, pages 41-43.

POINT II. IN REPLY TO THE CONTENTIONS THAT THE COMMISSION AND THE COURT BELOW LACK JURISDICTION

For the second ground of its motion the government argues *seriatim:*

1. That the segregation formula has been adopted by the Connecticut Court as the basis for the settlement of the accounts between the Boston & Providence and the New Haven and that the present action constitutes a collateral attempt to substitute a different method of accounting and is, therefore, improper.

2. That since the Boston & Providence is still free to contest the use of the adopted segregation formula in the settlement of the accounts in the Connecticut Court, the present proceeding is improper as duplicatory.

3. That since the contentions under §15 (6) of the Interstate Commerce Act could have been presented to the Commission prior to the "adoption" of the segregation formula, there is an estoppel against the assertion of such contentions now.

4. That since the weight accorded to the segregation formula was one of the issues before the Commission in its consideration of the reorganization plan for the Boston & Providence, the claims sought to be vindicated can and should be asserted before the Massachusetts Court.

The mutually contradictory character of these contentions of the Government Motion is so apparent as hardly to need statement. On the one hand the alleged "adoption" of the segregation formula establishes it the "law of the case" but on the other hand its use in the settlement of its

accounts can be attacked as improper and confiscatory. On the one hand the Boston & Providence is estopped to assert its claims to an allocation of earnings under the standards of the Interstate Commerce Act, but on the other hand it is free to assert those claims. On the one hand the Connecticut Court has exclusive jurisdiction of the issues as to the proper basis for determining the division of revenue, but on the other hand such issues may be presented to the Massachusetts Court.

Fortunately, it is unnecessary to engage in the lengthy and tedious analysis that would be required to expose the many fallacies which pervade each of the heads of this multiple Janus. All of them stem from a single neck and are vulnerable to a simple and single surgical cut; all of them rest on the premise that the segregation formula has been adopted as the basis for the settlement of the accounts between the New Haven Company and the Boston & Providence Corporation, whereas the simple fact is that it never has been so adopted.

As was pointed out in the Jurisdictional Statement (pp. 16-17) the segregation formula was prepared for the mortgage trustee for Bondholders of the New Haven Company and so far as the Boston & Providence Corporation is concerned was submitted to support the petition that the Boston & Providence lease should be disaffirmed.[7] On the referral of the formula by the Connecticut Court to the Interstate Commerce Commission for its "recommendations" the Commission held only that as a mathematical computation of intra-system charges the formula was as fair as "the circumstances" then prevailing would permit. That was all that the Commission ever held. The Commission not only did not adopt the formula for the governance of the accounts between the New Haven and the Boston &

[7] Where the Government derived its notion of an "elaborate plan so carefully and so tediously worked out over the years by the Commission, the parties, and the Connecticut Court" (Motion, p. 9) is nowhere stated. It is certainly not derived from the record.

Providence, but on the contrary in recognition of the formula's obvious limitations, the Commission specifically stated that it did *not* approve its use for any substantive purpose. Nor did the Connecticut Court do anything more at the time than grant the trustee's recommendation that the lease be disaffirmed.

The subsequent history of the proceedings also not only fails to support the Government's assertion, but affirmatively rebuts it. The only other order in any other way relating to the use of the formula as between the Boston & Providence and the New Haven was Order No. 301 entered by the Connecticut Court, which purported to settle the accounts between the two companies for the period from June, 1936 through 1937. That order, however, was reversed by the Court of Appeals for the Second Circuit in *Palmer* v. *Warren*, 108 F. 2d 164 on the basis of its holding, which, indeed, is specifically recognized by the Government (Motion, p. 9), that the Boston & Providence interests had never been properly heard on the issue and that the application of the formula to the Boston & Providence operating account was an open question.

Finally, however the ambiguous reasoning or statements of the Interstate Commerce Commission in its various opinions in the Boston & Providence reorganization proceedings may be construed, it is clear from its repeated, explicit statements that it has never passed, indeed has sedulously refused to pass, upon the merits of the segregation formula either in its application to the respective claims of the Companies or as a basis for determining the earnings or right to earnings of the Boston & Providence Corporation.[8]

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[8] It is true that the Commission sometimes spoke about the formula as having been "adopted" in its original opinion which, as we have seen, expressly disavowed adoption. 224 I.C.C. 723. Even when using such loose language, however, the Commission has always divested it of any legal significance by emphasizing that it disclaimed and always had disclaimed any intent to give the formula any binding effect. E.g., 290 I.C.C. 404, 412.

Since all the jurisdictional contentions of the Government rest on its assumptions that the segregation formula has been adopted for the governance of the accounts, the fact that the formula has *never* been so adopted is in itself sufficient to dispose of its contentions.[9] The government, indeed, now scrupulously avoids the contention that the jurisdiction of the Connecticut court over the operating accruals under paragraph (c)(6) of section 77 or the jurisdiction of the Massachusetts court over the Boston & Providence reorganization proceedings would *per se* deprive the Commission of its jurisdiction under section 15(6) of the Interstate Commerce Act. This is undoubtedly attributable to its recognition that such a contention clearly would raise substantial issues for the reasons set forth in appellants' Jurisdictional Statement (pp. 26-30).

Indeed, the government's own interpretation of Judge Hand's opinion in *Palmer* v. *Palmer*, 104 F. 2d, at p. 165, supports the view that an independent proceeding under section 15(6) lies—at least so long as no binding formula for the determination of the accounts has been adopted by the bankruptcy court (Government motion, p. 10, note 5).

Even in the absence of that opinion, it would appear to be clear that the jurisdiction of the Connecticut court over the accounts does not automatically oust the jurisdiction of the Commission to determine the fair allocation of revenues from joint traffic under the Interstate Commerce Act any more than it ousts the Internal Revenue Service and the Tax Court of their powers and responsibilities with respect to the resolution of tax questions, the answers to which also may play a significant role in the final settle-

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[9] Even if the segregation formula had been adopted by the Commission for the purpose alleged by the government it would be subject to challenge and revision. As this Court said in *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, at p. 364, "Congress is without power conclusively to bind the carriers . . . Congress has no power to make final determinations of just compensation or to prescribe what constitutes due process of law for its ascertainment".

ment of accounts to be submitted to and passed on by the New Haven's bankruptcy court.

It is a well-settled rule that the division of rates, like the fixing of rates, is a *legislative* and not a judicial function. As this Court said in *Terminal R.R. Association* v. *United States*, 266 U.S. 17, at page 30—

> The making of rates is a legislative and not a judicial function. . . . The division of joint rates is also legislative in character. The Interstate Commerce Commission is authorized to establish through routes and joint rates and to prescribe conditions upon which such routes shall be operated and to fix divisions of such rates among carriers. . . . It is well settled as a general rule that the question of the reasonableness of rates or of divisions of joint rates will not be considered by the courts before application has been made to the Commission.

So far as the Massachusetts court is concerned the answer is equally clear. Its function in evaluating the fairness of a plan of reorganization before it is primarily to predict what the future earnings of the debtor would be—*absent the reorganization.* See *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510; *Ecker* v. *Western Pacific R. Co.*, 318 U.S. 448; *Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U.S. 523. This in the present case would involve a prediction of the joint revenues and a prediction of what the Commission would hold to be a proper division of such joint revenues under section 15(6) of the Interstate Commerce Act. There is nothing in the Bankruptcy Act which could possibly justify the court in itself fixing the divisions so as to oust the Commission of its jurisdiction under section 15(6) any more than it could determine a debtor's income by itself fixing the rates to be charged to shippers and passengers so as to oust the Commission of its jurisdiction under the companion section of the Interstate Commerce Act. The fact that appellants can and will argue that the Massachusetts court may not

appropriately proceed to consider the plan prior to a determination of the revenues of the debtor under the standards of the Interstate Commerce Act for the purpose of determining its solvency, as well as the fairness of the plan, is, of course, wholly irrelevant to the Commission's jurisdiction to make that determination except insofar as it underscores the importance of the exercise of such jurisdiction.[10]

In sum, no formula in any way binding on the Boston & Providence Corporation has ever been adopted for the determination of the proper division of revenues from joint traffic of the Boston & Providence lines and the connecting true New Haven lines. The responsibilities of the Connecticut and Massachusetts courts, respectively, to rule on the accounts under paragraph (c)(6) of section 77 and to determine the solvency of the Boston & Providence Corporation and pass upon the proposed plan of reorganization, not only do not oust the Commission of its jurisdiction to divide the joint revenues in accordance with the standards of the Interstate Commerce Act, but appear to require action by the Commission thereunder as a prerequisite for the intelligent and informed fulfillment of those judicial responsibilities.

POINT III. IN REPLY TO THE ARGUMENT THAT THE BOSTON & PROVIDENCE CORPORATION IS NOT A CARRIER BY RAILROAD AND HAS NO RATES TO DIVIDE

The New Haven Company contends (Motion, p. 10) that the appeal should be summarily dismissed on the ground that the Boston & Providence Corporation is not a carrier by railroad engaged in transportation and that there are

[10] The recognition by the Massachusetts court of the importance of the present proceeding in aiding that court in carrying out its judicial responsibilities wth respect to the so-called debtor is indicated by its action in instructing the trustee in bankruptcy to intervene in the court below and in postponing further proceedings on the plan until the completion of the present proceeding.

no joint rates to divide between the Corporation and the New Haven Company.[11]

While it is true that from 1888 until July 19, 1938, the Boston & Providence Corporation was a lessor rather than a carrier, its lessor status terminated with the termination of its lease to Old Colony. As a matter of law the carrier status thereupon reverted to the Boston & Providence Corporation.

As lessor the Corporation had been as inactive as a mortgagee. But when its lease was rejected, its legal status became very different. When the New Haven or Old Colony Company defaulted on a mortgage, the mortgagee (such as Bankers Trust Company) remained a mere mortgagee under section 77, without even the right to foreclose. But when the executory lease was rejected it *terminated*, and with it terminated the lessor's status as lessor; it then resumed its original status which it had formerly enjoyed before it ever executed the lease—the status of a carrier financially engaged in the public transportation service over its railroad lines.

After its lease had terminated (just when its entire debt was maturing) the Boston & Providence Corporation was received for reorganization under section 77 in Boston. In order to be so received it had to qualify as a matter of law as a railroad corporation according to the strict definition of paragraph (m) of section 77—

> (m) The term "railroad corporation" as used in this . . . section means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce. 11 U.S.C. § 205 (m).

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[11] The Commission agrees with that position, but the Solicitor General and Assistant Attorney General Barnes, as counsel for the United States do not adopt it, so the joint Government motion mentions it without advancing it as a ground for summary dismissal. (Motion, page 5, note 1, and pages 11-12.)

Having accepted the Corporation as a carrier by railroad for purposes of its ministrations under Section 77 of the Bankruptcy Act the Commission ought to accept it likewise for purposes of the Interstate Commerce Act.

The fact is that the Interstate Commerce Act divides all railroad companies into the two categories of *carriers* and *lessors*.

> (8) . . . the term "carrier" means a common carrier subject to this part, . . .;[12]
>
> . . . the term "lessor" means a person owning a railroad, a water line, or a pipe line *leased to* and operated by a common carrier subject to this part . . . (Emphasis added.)
>
> Section 20, 49 U.S.C. § 20. See paragraphs (1), (5), (7).

The Boston & Providence Corporation has been a carrier with respect to the movement of all traffic on its railroad system since the lease terminated. The Corporation has maintained the franchises. Its lines and trackage are crowded with traffic. The Corporation is the party charged by law with the full cost of providing the entire transportation service, including the rolling stock. The function of the New Haven Company is to provide the services of a general operating agent, and to operate an equipment pool. In such a situation the principal, not the agent, is the carrier within the contemplation of the Interstate Commerce Act. *Powell* v. *United States*, 300 U.S. 276, 285.

The classification of "non-operating railroad" or, rather, "non-operating carrier" has no support in the Interstate Commerce Act, or in court decisions. The New Haven Company, however, cites it in support of the ground for

[12] The Commission subclassified *carriers* into Class I line-haul carriers (with gross revenues exceeding $1,000,000 annually), Class II and Class III line-haul carriers (with smaller revenues), and switching or terminal companies. See I.C.C. Steam Railway Annual Report Form A, instructions inside front cover.

summary dismissal now under consideration. It finds such a classification in one decision of the Commission itself, *Wood* v. *New York Central R. Co.*, 286 I.C.C. 373, wherein the Commission devised such a classification to justify its denial of divisions to the Peoria & Eastern Railway Company as against New York Central. But neither the *Wood* decision nor earlier decisions in the Commission on which it was said to rest, are applicable to the present case.

In the present case the New Haven Company is the operating agent for the Boston & Providence Corporation, by virtue of paragraph 5 of Order 217 in the New Haven Company's reorganization proceeding, dated July 17, 1938, (R. folio 117), which stated that the operation of Boston & Providence properties "shall be conducted by the New Haven Trustees in behalf and for the account of the Old Colony estate but without expense to the New Haven estate." The order was modified on September 11, 1947, at the time of the New Haven Company's emergence from reorganization, but that company continued on in the agency. The risk of loss and burden of the franchises are on the Boston & Providence Corporation, and its operating agent is an altogether separate company, having no financial commitment under the agency to support the operation and only a very limited minority investment in its shares.

The relationship of the Peoria & Eastern and the New York Central, which was the subject of the *Wood* case, was vitally different. To begin with, the Peoria Company is a *subsidiary* of the New York Central Railroad Company. Its directors and officers, except for one man, are directors or officers of the New York Central Company or of companies in the New York Central System. The relationship, which rests on an 1890 agreement, is unclear. As the Commission itself stated in its opinion, "the precise status of the parties in realtion to each other, that is, whether by the contract the Big Four was established as the Peoria & Eastern's agent or as bona fide lessor [i.e., lessee], was

not determined." 286 I.C.C. 373, 378. The original agreement set forth that it would "be beneficial to the business and traffic of said railways [the contracting parties] that the same be put under one management." (Page 2 of the Peoria Agreement, quoted *ibid.*) The Court of Appeals had found that, "In short, the Peoria was to become part of a single railway system, operated as a constituent unit after the conventional pattern in such cases." *Ewen* v. *Peoria & Eastern R. Co.*, 78 F. Supp. 312, 316. By that agreement Big Four (which is a large lessor and subsidiary in the N.Y.C. System) and its successors were bound to pay certain rentals, interest, and taxes plus all operating expenses for the Peoria company and the recovery of such advances was limited by the terms of the agreement, as follows:

> Fifth.—The Cleveland Company [the Big Four] shall and will look only to such future net earnings of said lines of railroad operated by it under these presents ... for the reimbursement to it of any sums it may advance in compliance with its aforesaid covenants and agreements. (Page 7 of the Peoria Agreement, Appendix A to petition for certiorari, No. 467, Supreme Court of the United States, October Term, 1940.)

Big Four and its successor, New York Central, acquired no general claim against the Peoria company for any advances. Either they recouped their losses out of the Peoria's earnings before the end of the agreement or they had no recovery.

Given the differences between the relationship of the Peoria Company with the New York Central, and the relationship of the Boston & Providence Corporation with the New Haven Company, the *Wood* case affords little guidance. As a *subsidiary* company in the New York Central Corporate System, Peoria could have been dealt with under the language of *Pittsburgh & West Virginia Ry. Co.* v. *Pittsburgh & Lake Erie R.R. Co.*, "In our judg-

ment, for the purpose of fixing divisions the separate corporate organizations of these commonly controlled and operated carriers should be disregarded and they should be treated as one system." 61 I.C.C. 272, 284.

Even more simply, the treatment of the Peoria company could be justified on the ground that it is a *lessor*, although with a lease having unconventional terms. (New York Central reports Peoria as both a subsidiary and lessor in its annual reports to the I.C.C.)

If the *Wood* case, however, is to be taken as holding that a railroad company which has its railroad system operated by an agent for its account is a "non-operating carrier" without right to divisions under the Act established principles of agency law, it would seem clearly in conflict with past decisions dealing with railroad operations carried on by an agent. *Powell* v. *United States, supra; New York, S. & W. R. Co. Reorganization*, 261 I.C.C. 101, 271 I.C.C. 339, 349, 275 I.C.C. 10, 24; *Terminal Allowances at Minnesota Transfer*, 268 I.C.C. 5, 9-10.

Insofar as the Wood decision holds that the Peoria company is a non-operating carrier because its lines are operated by a management shared in common with a controlling parent company, it is not only irrelevant but in conflict with the Commission's own views in *Central R. Co. of Pennsylvania Lease*, 261 I.C.C. 755, 775; and *New Jersey & New York R. Co. (Peter Duryee, trustee)* v. *Erie R. Co.*, 292 I.C.C. 479. See also *Backus-Brooks* v. *Northern Pacific R. Co.*, 21 F. 2d 4, certiorari denied 275 U.S. 562.

In the *Central Railroad Company of Pennsylvania* case, the Commission approved transfer for carrier status from the parent Jersey Central Company to the Pennsylvania Company, and held that the Pennsylvania company was entitled to divisions against Jersey Central, which the Commission approved. The Pennsylvania company's entire capitalization was limited to 500 shares of stock, all held by Jersey Central (except qualifying shares), and it

had no separate operating management. The separation was established by a lease for 15 years, solely to segregate Jersey Central's mileage in Pennsylvania (from Easton to Wilkes-Barre and Scranton) in order to insulate it from taxation under the New Jersey Railroad Tax Law of 1941. The Commission approved the arrangement over the opposition of the State of New Jersey.

In the *New Jersey & New York* case, the company was left behind as an orphan under section 77 when the parent Erie company emerged from reorganization. The Ohio reorganization court appropriately transferred the matter to New Jersey. Although 84% owned by Erie, and showing its operating management (except for the trustee) as furnished entirely by the Erie (see The Pocket List of Railroad Officials) and drawing all its equipment from the Erie pool (see Jurisdictional Statement, pp. 32-33), the Commission recognized it as a carrier and therefore increased its divisions from through traffic with the Erie Railroad Company.

Reference may also be made to the New York Connecting Rail Road Company, which is accorded carrier status and receives divisions although it owns only 9 miles of road, with 12 more miles of trackage, is managed entirely by the New Haven Company, draws on the New Haven equipment pool for all locomotives and cars required, and is entirely owned by the New Haven and Pennsylvania Railroad companies. It was set up as a carrier to replace operation by the New Haven, in connection with mortgage bond financing, which ran to $3,000,000 per mile. Its divisions kept its bonds at top investment grade throughout the reorganization.[13]

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[13] The I.C.C. Blue Book for 1952 (published in 1955) classifies it as a Class I line-haul carrier in the New England region, separate from the New Haven System. *Statistics of Railways in the United States* (1952), I.C.C., pages 126, 311, 329, 557, and 563, line 201. Compare the erroneous listing of Boston & Providence on line 203, as a subsidiary of and lessor to the New Haven Company. This error possibly influenced the position of counsel.

In view of the foregoing standard treatment, the Wood decision must fall back for support, if it be supportable, on the proposition that Peoria was not a carrier solely because it was not a party to joint rates filed with the Commission. This indeed seems to be the actual *rationale* of the Commission's position before the court below.

As for there being no joint rates to divide between the Boston & Providence Corporation and the New Haven Company, appellants deny it. There is constant public transportation of persons and goods in through movements over the connecting lines of the two railroad systems. The service is performed for revenues calculated according to tariffs filed or concurred in by the New Haven Company acting in several capacities, that is to say, as principal with respect to transportation service on its own lines, as agent for the New York Connecting, Grafton & Upton, Moshassuck Valley, Narragansett Pier, and Union Freight railroad companies by explicit statement in the tariffs which Mr. H. D. Hartmann, the New Haven freight traffic manager, issues for all those companies, and as agent for the Boston & Providence Corporation, by virtue of Order 217, of which all the world has notice, including, not least, the Commission. (See the cover of New Haven Freight Tariff 1-A, I.C.C. No. F 4340.) Such filing is part of the New Haven's assigned duties as general operating agent for the Boston & Providence Corporation.

If the tariffs thus filed are perhaps irregular as to their precise technical formalities, in not listing the Boston & Providence Corporation explicitly along with the other principals, such a defect is a ministerial error by which the New Haven Company should not be allowed to manipulate a profit for itself, or to alter the course of basic legal relationships.[14] The Commission, of course, has

[14] Possibly a clause might be added to the New Haven tariffs, such as "for its own account and for the account of the Boston & Providence Railroad Corporation on the latter's lines."

had notice of the financial responsibility for transportation service on the Boston & Providence lines since 1938. It would be a curious result if the Commission could now deny the substantive relief asked by appellants because it has tolerated a possible irregularity in the formalities of the tariffs and concurrences which has accepted all along to govern the public transportation service over the Boston & Providence lines.[15]

But even if no joint rates existed at the time appellants filed their complaint with the Commission, it could have established such rates and divided them as requested by the appellants in their prayer for relief. Such relief, contrary to the New Haven Company's statement (Motion, page 7, footnote 10), was approved by this Court in *United States* v. *Great Northern Ry. Co.*, 343 U.S. 562. There would be no valid reason for denying the same relief here.

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[15] Compare the Commission's treatment of the Wisconsin Central Railway Company. The reorganization of that company presented a close parallel to the present case. The Soo Line receivers terminated their company's lease of the Wisconsin Central System (which extends the Soo from the Twin Cities and Twin Ports down to Chicago). A new arrangement was worked out, according to the I.C.C. 1952 Blue Book (p. 576), by the receivers of the two companies, with court approval, whereby the Soo Line continued to operate the Wisconsin Central lines, but as agent for the Wisconsin Central Company, which went into receivership on December 3, 1932, the date of the agreement.

Soo Line continued to file the tariffs entirely in its own name, just like New Haven, but Wisconsin Central was established as the party entitled to the full benefit of the rate divisions east of the Twin Cities and Twin Ports. The 1952 Blue Book listed *Wisconsin Central* as a *Class I line-haul carrier*, a separate carrier in the "Canadian Pacific System." Pages 127, 428, 430, 434, 448, 576.

(The I.C.C. 1938 Blue Book still listed Wisconsin Central as a lessor, but the 1952 Blue Book (published in 1955) has corrected the error.)

POINT IV. AS TO THE NEW HAVEN COMPANY'S ARGUMENT THAT APPELLANTS' REMEDY IS BY MANDAMUS

The New Haven Company (Motion, pp. 10-11) asserts that appellants have no standing to bring this action but should have proceeded by mandamus in the courts for the District of Columbia.

The United States and Interstate Commerce Commission urged that position as a main ground for dismissal in the court below, but they do not adopt that position now.

Since this Court's decision in *Rochester Telephone Co.* v. *United States,* 307 U.S. 125, mandamus, in appellant's view, would not be an appropriate remedy for them. As set forth above, the order of the Commission affected their interest directly, and even the New Haven Company in the footnote on page 11 of its motion concedes that a negative order having a direct effect on a party is reviewable under the Urgent Deficiencies Act on the basis of the *Rochester Telephone* decision.

CONCLUSION

For the reasons set forth in this brief, appellants respectfully submit that the motions of the appellees have not demonstrated, under Rule 16, "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need any further argument."

Respectfully submitted,

ARMISTEAD B. ROOD

JOSEPH B. HYMAN

Counsel for Appellants

CASSIUS M. CLAY

SIDNEY H. WILLNER
Of Counsel

December 9, 1955

No. 437.

DEC 16 1955

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and THE UNITED STATES,

Appellees.

MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO FILE BRIEF *AMICUS CURIAE.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 437.

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and THE UNITED STATES,

Appellees.

MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO FILE BRIEF *AMICUS CURIAE.*

Samuel M. Freeman and William P. Sheffield, as the Boston and Providence Railroad Corporation Stockholders Committee (herein called the Committee), hereby respectfully move for leave to intervene in this cause. In the alternative, the Committee prays leave to file a brief *amicus curiae*. Appellants' counsel, the General Counsel of the Interstate Commerce Commission and the Solicitor General have consented to the filing of a brief *amicus curiae*. Such consent has not been received from counsel for The New York, New Haven and Hartford Railroad Company (herein called New Haven).

The Committee's interest arises from the fact that it holds written authorizations to represent the registered holders of more than 17,000 shares of the capital stock of Boston and Providence Railroad Corporation (herein called B&P). The shares represented either by the Committee or by appellants together amount to a majority of the 36,688 shares outstanding.* If the shares owned by or believed to be optioned to New Haven are excluded, the shares outstanding in the hands of the public are 22,185, of which the shares represented either by the Committee or appellants amount to over 83%.

The Committee has an absolute right to "intervene at any time" in this cause (28 U. S. C. §2323; *cf. Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 526-530). As to the right of the Committee to intervene at the present stage of the proceeding see *Eastern-Central Motor Carriers Association* v. *United States*, 321 U. S. 194, where the National Industrial Traffic League was permitted to intervene in this Court (see 1 West's Federal Forms, §399).

The Committee did not seek to intervene in the court below, expecting the reorganization trustee to do so. When for reasons best known to himself, the trustee failed to do so, the Committee joined appellants in asking the B&P reorganization court to instruct him to do so. The Massachusetts court issued the instruction but the Virginia court refused leave to the trustee to intervene. The trustee has refused to appeal from that refusal. Under these circumstances it is all the more important that the actual majority owners of the property speak to this Court through representatives of their own choosing.

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* Of the 40,000 authorized shares of B&P stock, 40 are held in the treasury and 3,272 are held in the sinking fund for B&P debentures.

The Committee is of the opinion that the questions presented by the present appeal are substantial and vitally affect the primary interests of the B&P stockholders. The Committee believes that the decision of the appeal on the merits will be of the utmost importance to the B&P stockholders. The Committee has for many years opposed the efforts of New Haven to acquire the B&P assets on the basis of assumptions as to their earning potentialities which have not been properly investigated or determined. The Committee is confident that a determination of the appeal after full consideration on the merits will have the effect of permitting the B&P stockholders to establish the solvency of their corporation and thus their right to retain their interests and resume control over its affairs.

WHEREFORE the Committee prays leave to intervene in support of appellants' position and, if the Court decides to hear argument on the merits, to file a brief and participate in the oral argument. In the alternative, the Committee prays leave to file a brief *amicus curiae*.

Dated at New York, New York, this
15th day of December, 1955.

Respectfully submitted,

RALPH MONTGOMERY ARKUSH,
Counsel for Boston and Providence
Railroad Corporation Stockholders
Committee,
15 Broad Street,
New York 5, New York.

JACOB J. KAPLAN,
NUTTER, MCCLENNEN & FISH,
Of Counsel,
75 Federal Street,
Boston 10, Mass.

Certificate of Service.

I hereby certify that I have this day served the foregoing motion by depositing a copy thereof in a United States mail box, with first class postage prepaid, addressed to each counsel of record at his post office address.

New York, N. Y., December 15, 1955.

RALPH MONTGOMERY ARKUSH.

FILED
DEC 21 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

OBJECTION TO THE MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO FILE BRIEF AMICUS CURIAE

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HERBERT BURSTEIN,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and the UNITED STATES OF AMERICA,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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OBJECTION TO THE MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE OR, IN THE ALTERNATIVE, TO FILE BRIEF AMICUS CURIAE

Appellee, The New York, New Haven & Hartford Railroad Company, pursuant to Rule 42(3) of the Revised Rules of this Court, files the within objection to the motion by the Boston and Providence Railroad Corporation Stockholders Committee, for leave to intervene or, alternatively, to file a brief *amicus curiae*.

Statement

Appellee, The New York, New Haven & Hartford Railroad Company, withheld consent to the filing of a brief *amicus curiae* because it believes that the movant has no *locus standi*. A motion of this kind is not favored [Rule 42(1)] because it adds nothing to the resolution of the issues before this Court.

Appellee further objects to the motion on the ground that it does not set forth "facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case: * * *" [Rule 42(3)].

I

The appeal in this case was taken from certain final orders of a three-judge statutory court, dismissing a complaint in an action instituted by the appellants under the Urgent Deficiencies Act, 28 U. S. C. §§ 1336, 1398 and 2321-2325, inclusive.

The action in the three-judge court, as well as the complaint filed with the Interstate Commerce Commission, asserted harm to the Boston and Providence Railroad Corporation and sought the vindication of a corporate right. (Jurisdictional Statement, pp. 22-23, Appendix, p. 2a).[1]

In *New York Central Securities Corporation* v. *United States, et al.*, 54 F. (2d) 122 (D. C. N. Y., 1931), affirmed 287 U. S. 12, the Court held that a stockholder cannot, in a suit under the Urgent Deficiencies Act, assert harm to the corporation. *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479.

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[1] The standing of the Committee cannot be equated with that of a stockholder. The authorizations referred to in the Motion (p. 2) do not create standing. At best, the Committee represents minority stockholders only.

There is no allegation in the complaint of an independent, as distinguished from a derivative, interest, i.e. a claim that any portion of the operating revenues is to be paid directly to the stockholders (Jurisdictional Statement, Appendix, p. 1a, 2a, 9a). Indeed, any such claim should have been asserted in the principal action, and not at this stage of the appeal.

II

Appellee does not seek to foreclose the assertion of legally cognizable rights. It objects only because the movant has no right to intervene or to file a brief *amicus curiae*.

WHEREFORE, appellee prays that the motion be denied in all respects.

Respectfully submitted,

WILLIAM T. GRIFFIN,
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New York, New York.
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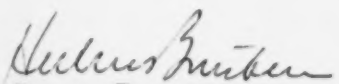
135 Broadway,
New York, New York.



HERBERT BURSTEIN,
of Counsel.

Dated: New York, N. Y.,
December 19, 1955.

Certificate of Service

I hereby certify that I have this day served the foregoing Objection to the Motion by Boston and Providence Railroad Corporation Stockholders Committee by depositing a copy thereof in a United States mail box, with first class postage prepaid, addressed to each counsel of record at his post office address.

New York, New York, December 19th, 1955.

Herbert Burstein

HERBERT BURSTEIN

Office - Supreme Court, U. S.
FILED
JAN 3 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 437.

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS,

Appellants,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, INTERSTATE COMMERCE COMMISSION and THE UNITED STATES,

Appellees.

REPLY TO OBJECTION OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY TO THE MOTION OF BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE FOR LEAVE TO INTERVENE, ETC.

The objection filed by New Haven to the motion of the Boston and Providence Railroad Corporation Stockholders Committee for leave to intervene, or, in the alternative, to file a brief *amicus curiae,* appears to assert as one ground for objection that the Committee represents only the minority of the stockholders of B&P. While the Committee does not regard that purported ground as germane to the consideration of its motion it believes, now that the issue has been raised, that it may be helpful to the Court to have the factual situation clarified.

As was stated in the motion (note, page 2), although 40,000 B&P shares are authorized, 40 are held in the

treasury and 3,272 are held in the sinking fund to secure the B&P debentures, which have all been acquired by the New Haven Company.[1]

Thus, only 36,688 shares are actually outstanding, *i. e.* held outside B&P, of which 3,397 are now registered as owned in the name of New Haven, leaving 33,291 shares registered as publicly held (See Jurisdictional Statement, page 13).

Of these 33,291, the stockholder list for December 16, 1955 lists 8,106 shares as registered in the name of Central Standard Life Insurance Company of Chicago. Central Standard has been acquiring them during the past eighteen months for a price of $105[2] pursuant to contracts entered into with New Haven Company under which Central Standard gave New Haven an option to buy the shares at Central Standard's cost price, in return for which New Haven agreed to indemnify Central Standard against loss, and to pay Central Standard current income at 5% per annum on the latter's investment, plus a flat fee on each share, and in addition New Haven deposited and pledged a large block of its own senior Harlem River bonds as collateral. New Haven has also entered into similar arrangements for acquisition by other third persons of as many as 3,850 shares at flat prices up to $120 per share under the same type of arrangement for options to New Haven in exchange for indemnification, current income, collateral,

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[1] A reorganization trustee must act in the interests of creditors as well as stockholders. The interests in this case conflict.

[2] Central Standard also presented its sellers with a letter agreeing to pay them later whatever additional price New Haven or Central Standard might pay to other sellers in order to obtain 51% of the B&P shares by July 1956. The program to assemble a majority for the New Haven Company was doubtless motivated by fear that the B&P Corporation would be protected by the Florida East Coast merger decision (*St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, see Jurisdictional Statement, page 28) if it should remain an independent corporation.

and a fee (or commission) running as high as $6.25 per share.

Without now raising the obvious issues with respect to the legality or fiduciary propriety of the above mentioned transactions, the Committee is of the view that none of the above mentioned shares covered by options—estimated at 11,106—should be considered in the class of publicly held shares. Of the remaining 22,185 shares the Committee, as the only committee now licensed by the Interstate Commerce Commission to represent the stockholders, holds written authorizations (under the modern practice in lieu of deposits) to represent more than 17,000. The Committee and the appellants together speak for more than 18,345 shares, which amounts to a majority of the entire 36,688 outstanding shares, 55% of the 33,291 shares registered as publicly held and 83% of the 22,185 shares in reality publicly held.

WHEREFORE, the Committee prays the Court to grant its motion, and to regard the appeal as supported by the holders of an absolute majority of the shares speaking in the only way they can speak, and to proceed to full consideration of the merits.

Dated at New York, N. Y., the 30th day of December, 1955.

Respectfully submitted,

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Counsel for Boston and Providence Railroad Corporation Stockholders Committee,
15 Broad Street,
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JACOB J. KAPLAN,
NUTTER, MCCLENNEN & FISH,
Of Counsel,
75 Federal Street,
Boston 10, Massachusetts.

Certificate of Service.

I hereby certify that I have this day served the foregoing reply by depositing a copy thereof in a United States mail box with first class postage prepaid, addressed to each counsel of record at his post office address.

New York, N. Y., December 30, 1955.

RALPH MONTGOMERY ARKUSH.

FILED
FEB 3 1956
HAROLD B. WILLEY, Clerk

No. 437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO CLARIFY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO CLARIFY THE ORDER OF JANUARY 9, 1956

The appellants respectfully move the Court to clarify its Order of January 5, 1956, which reads as follows:

PER CURIAM: The motion of Boston and Providence Railroad Corporation Stockholders for leave to inter-

vene or, in the alternative, to file brief as *amicus curiae* is denied. The motions to affirm are granted and the judgment is affirmed.

The Court has not given any opinion or citation to show the basis of its summary affirmance. Thus it has left unresolved three major questions raised by the Appeal, whose resolution is essential for the unavoidable further proceedings involving the rights of the Boston and Providence Railroad Corporation and its security holders. These questions are as follows:

1. Did the Court mean to bar the present action on the ground that only the Corporation or its trustee in bankruptcy can obtain court review of the adverse ruling which the Interstate Commerce Commission entered against the stockholders under Section 15(6) of the Interstate Commerce Act? *Or* did the Court mean to hold that the Boston & Providence Corporation itself has no right to relief under Section 15(6)?[1]

2. Did the Court mean to hold that because the Boston & Providence System is being operated under a court order entered pursuant to Section 77(c)(6) of the Bankruptcy Act no independent remedy under Section 15(6) of the Interstate Commerce Act is available? *Or* did the Court mean to hold more broadly that because the present operating arrangement was established pursuant to Section 77(c)(6) the Boston & Providence Corporation is not entitled in this or any other proceeding to have its revenues from through transportation service measured according to the standard provided in Section 15(6)?

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[1] Or did the Court merely intend to bar the action because it was not brought as an action in the nature of mandamus in the District of Columbia, as the New Haven urged?

3. Did the Court mean to direct the Boston & Providence Corporation and its stockholders to the New Haven reorganization court and the Boston reorganization court for the assertion of their claims as to the unfairness and inequity of the application of the segregation formula of 1938 to their accounts with the New Haven—as urged by the Solicitor General? *Or* did the Court mean to hold—as urged by the New Haven—that the Boston & Providence Corporation is finally bound by the formula in any division of the revenues and may not challenge it in any proceeding?[2]

The judicial and administrative proceedings for the reorganization of the Boston & Providence Corporation in the Boston court and the operation of its railroad system by the New Haven under the New Haven court have now gone on for 17½ years. The presently inevitable litigation as to the proper construction of this Court's action of January 9 may well serve to protract indefinitely the proceedings which have already been protracted unconscionably. Petitioners submit that in the interest of sound judicial administration it is important that this Court clarify its ruling on the above issues raised by this Appeal so that the federal tribunals and the parties may be able to proceed properly. Such clarification would seem to be particularly appropriate in view of the fact that many of the difficulties in determining the respective rights and claims have been attributable to the divergent interpretations of the intended scope of this Court's statement in *Warren* v. *Palmer*, 310 U.S. 132.

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[2] The Government position follows the ruling of the Court of Appeals for the Second Circuit in *Palmer* v. *Warren*, 108 F. 2d 164. The position of the New Haven follows the conflicting position of the court below in this action.

In that case this Court approved the assumption by the New Haven's reorganization court of jurisdiction over the Boston & Providence operating accounts. In so doing it said (at page 138) that Section 77(c)(6) "modifies *pro tanto* the rule of the Interstate Commerce Act for operation". There has since been continuous disagreement as to whether, by reason of this language, Section 77(c)(6) displaces the provisions of the Interstate Commerce Act not only with respect to operation and abandonment but also with respect to the substantive standards of the Act, such as those establishing the standards to govern the division of revenues from through traffic.

WHEREFORE, petitioners respectfully pray the Court to clarify its affirmance of the judgment below.

Dated at Washington, D. C., this second day of February, A.D. 1956.

Respectfully submitted,

ARMISTEAD B. ROOD

JOSEPH B. HYMAN

Counsel for Appellants

CASSIUS M. CLAY

SIDNEY H. WILLNER

Of Counsel

Office - Supreme Court, U.
FILED
FEB 3 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955—No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

PETITION TO RECONSIDER THE ORDER OF JANUARY 9, 1956

The appellants respectfully petition the Court to reconsider its Order of January 9, 1956.

By its Order of January 9 the Court summarily affirmed the judgment of the lower court. That judgment contains holdings on the Administrative Procedure Act, the Interstate Commerce Act, the Urgent Deficiencies Act, the Bankruptcy Act, and the Fifth Amendment to the Constitution which are of great importance and unprecedented. They conflict with holdings in other circuits and with holdings of this Court. Their effect is confiscatory.

Additional grounds for this petition are set forth in the accompanying petition and motion.

Dated at Washington, D. C. this second day of February, A.D. 1956.

Respectfully submitted,

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No. 437

FILED
FEB 3 1956
HAROLD B. WILLEY, Clerk

preme Court of the United States

OCTOBER TERM, 1955

STON AND PROVIDENCE RAILROAD CORPORATION
STOCKHOLDERS, *Appellants*

v.

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD
COMPANY ET AL., *Appellees*

AL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ITION FOR RECONSIDERATION OF THE JUDGMENT AS TO COSTS

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Supreme Court of the United States

OCTOBER TERM, 1955

No. 437

BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS, *Appellants*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

PETITION FOR RECONSIDERATION OF THE JUDGMENT AS TO COSTS

The appellants respectfully petition the Court to reconsider so much of its Order of January 9, 1956, as affirmed the judgment of the court below taxing extraordinary costs against the plaintiffs on the ground that their action to obtain judicial review of the order which the Interstate Commerce Commission entered against them was vexatious and oppressive to the New Haven Railroad Company.

Petitioners believe that this Court, in its summary disposition of the appeal, may have passed over this question, which in the presentation of the appeal was necessarily subordinated to the discussion of the substantive issues. Petitioners find it impossible to conceive that, if the question were considered separately, this Court would have found that the action was not brought in good faith for the purpose of resolving properly litigable issues and that the parties bringing it should be punished by a financial penalty and a judicial reprimand.

This proceeding was begun before the Interstate Commerce Commission to obtain a division of rates under Section 15(6) of the Interstate Commerce Act. Its purpose was to establish the actual solvency of the Boston and Providence Railroad Corporation on the theory that its apparent insolvency was attributable to the fact that it had been unlawfully deprived of a proper division of the revenues collected by the New Haven Company for joint transportation service over the two railroads. The decision to assert this claim in a Section 15(6) proceeding arose in part from the suggestion of Judge Learned Hand in *Palmer* v. *Palmer*, 104 F. 2d 161, at page 165, that this was the only way to obtain a consideration of this claim under the Interstate Commerce Act.

The standing of petitioners, as stockholders of the B&P Corporation, to bring a proceeding under Section 15(6) before the Commission is well settled and has not been challenged. Issue was raised, however, as to their standing to obtain review of the Commission's order denying the relief sought. If this asserted lack of standing was the basis of the Court's affirmance, it is, so far as petitioners know, the first holding that a complainant entitled to institute a proceeding for relief before the Commission has no standing to obtain judicial review of the Commis-

sion's adverse order. For this reason alone petitioners cannot see how the bringing of the review proceeding can possibly be deemed frivolous on this ground. In addition there was a substantial basis for the assertion of standing by virtue of the independent economic interest of the stockholders in establishing the solvency of their Corporation and regaining control over it by terminating its reorganization.[1]

The issue was also raised that the jurisdiction of the federal court at New Haven which had directed the New Haven Company to operate the Boston & Providence System under Section 77(c)(6) of the Bankruptcy Act was exclusive, and had ousted the Commission and the courts from their normal jurisdiction to regulate revenues from through traffic under Section 15(6) of the Interstate Commerce Act and the Urgent Deficiencies Act (28 U.S.C. §§ 1336, 1398, and 2321 to 2325 inclusive). If this was the basis of this Court's affirmance of the judgment below, it is the first time that this aspect of the relationship of these two important statutes has been considered and resolved. Again, petitioners submit that to seek judicial determina-

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[1] The informed Boston reorganization court ordered the B&P trustee to intervene as co-plaintiff, in face of the New Haven's oral and written argument that this action was vexatious and oppressive. The Boston court, on its own initiative, has postponed hearing the reorganization plan for more than a year, solely in deference to the importance of this action to the B&P reorganization.

In addition the B&P Stockholders Committee sought to intervene in this appeal, so that it would be supported by nearly the entire class of B&P stockholders (except for shares controlled by the New Haven).

All this attests the seriousness of this action.

tion of this vital question cannot fairly be deemed "vexatious and oppressive" or be taken to show frivolity and bad faith.

The third major issue was that as a matter of construction of the Interstate Commerce Act the Boston & Providence Corporation is not a carrier entitled to a division of rates under that Act. This was the Commission's sole basis for denying relief. Again, if it was also the basis of this Court's summary affirmance, it should be noted that the question whether the operation of a railroad for the account of its owner under Section 77(c)(6) deprives the owner of carrier status for purposes of regulating its revenues from the public transportation service has never been previously settled. That the issue is, at the least, not frivolous is indicated by the fact that the Solicitor General expressly refrained from making it a ground of his motion to affirm.

While according full recognition to the problems of this Court in allocating its time among the many claims upon it, petitioners have found it difficult to understand the decision to dispose of the foregoing issues, all of which are both novel and important, on a summary basis without full consideration. In any event, and with all respect, they find it incredible that any court should regard their raising of these issues as an indication of bad faith and frivolity requiring them to be stigmatized and penalized.

The action of the court below in this regard can be attributed only to its reliance on unsupported statements by the New Haven that the legal issues before the court had been previously presented and resolved. As petitioners have demonstrated in their Jurisdictional Statement (at pages 34-37) and their Brief in Opposition to the Motions to Affirm (at pages 10-12) there is no basis for those as-

sertions. Indeed, the Commission and the Solicitor General scrupulously refrained from associating themselves with them.[2]

The action of the court below thus constituted a clear abuse of discretion—an abuse which, in the context, has the effect not only of wronging petitioners but of discouraging security holders from acting in good faith for the vindication of their legitimate interests.

WHEREFORE, petitioners respectfully and earnestly pray the Court to reconsider its affirmance of that part of the judgment below which taxes extraordinary costs and upon reconsideration to reverse summarily.

Dated at Washington, D. C. this second day of February, A.D. 1956.

Respectfully submitted,

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JOSEPH B. HYMAN

Counsel for Appellants

CASSIUS M. CLAY

SIDNEY H. WILLNER

Of Counsel

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[2] The Government motion appeared to argue that the 1938 segregation formula had been adopted by the New Haven reorganization court, but it recognized that the issues which would be raised by applying the formula to the operating account remained open.

Decisions Per Curiam.

No. 437. BOSTON & PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL. Appeal from the United States District Court for the Eastern District of Virginia. *Per Curiam:* The motion of Boston & Providence Railroad Corporation Stockholders Committee for leave to intervene or, in the alternative, to file brief as *amicus curiae* is denied. The motions to affirm are granted and the judgment is affirmed. *Armistead B. Rood, Joseph B. Hyman,*

Cassius M. Clay and *Sidney H. Willner* for appellants. *Solicitor General Sobeloff, Assistant Attorney General Barnes, Robert W. Ginnane* and *Isaac K. Hay* for the United States and the Interstate Commerce Commission, and *William T. Griffin* and *Herbert Burstein* for the New York, New Haven & Hartford Railroad Co., appellees. Reported below: 133 F. Supp. 488.